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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,
Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,
Respondents.

PETITIONERS' BRIEF ON THE MERITS.

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V. Summary of Argument:

I. The underlying proposition involved is that this is an action in tort brought against respondents as joint tort feasors on account of the exaction from petitioners of unlawful and unauthorized charges by the means of an unlawful practice resorted to by respondents in order to settle a controversy between themselves with reference to such unauthorized charge. This practice was unreasonable and unlawful because (1) the published tariffs of the line-haul carriers undertook the complete transportation of live stock to the Union Stock Yards at Chicago for a through rate or charge contemplating complete transportation, including unloading, and the rights of the shipper growing out of such published tariffs cannot be disturbed or increased except by a change made in the published tariffs of the line-haul carriers in accordance with paragraph 3 of Section 6 of the Act; (2) said extra unauthorized charge was not authorized either by the published tariffs of the line-haul carriers or by the published tariffs of the Stock Yard Company; (3) the Stock Yard Company, in performing the unloading service, acted as a mere agency or instrumentality of the line-haul carriers; (4) under the particular facts and circumstances in this case the exaction from petitioners through the joint action and cooperation

of the line-haul carriers and the Stock Yard Company was a wrongful and tortious act which rendered respondents jointly and severally liable to make reparation regardless of which of them in the first instance collected the unlawful charge, and regardless of which of them benefited pecuniarily thereby..... 19

II. The Circuit Court of Appeals should have accepted as conclusive the finding of the Commission based upon sufficient evidence and involving a purely administrative matter, to the effect that the practice resorted to by respondents to exact from petitioners the extra charge of 25 cents per car was an unreasonable and unlawful practice. The practice condemned was not that of setting up in published tariffs a separate terminal charge covering the unloading service. We concede this might have been done by the line-haul carriers. The decision of the Circuit Court of Appeals establishes the precedent that a line-haul carrier who has for 50 years assumed the entire burden of the expense connected with the performance of a terminal service, and who has continuously performed such service through the instrumentality of an agent, may lawfully, without changing its published tariffs, unite with the agency performing the terminal service in a practice whereby there is exacted from the shipper an additional charge over and above the through rate specified in the published tariffs of the line-haul carrier. Although the question as to whether the increased charges of the Stock Yard Company were unreasonable from the standpoint of their being excessive is wholly immaterial in this case, we have never admitted that such charges were reasonable in amount. The question as to whether the line-haul carriers should have absorbed the

increased charges of the Stock Yard Company not involved, inasmuch as the Commission, after it had declared the charge unlawful, was not required to go further and investigate whether the amount thereof was reasonable. The conclusion of the Circuit Court of Appeals that the Stock Yard Company in effect collected the controversial charge from the shipper or consignee, and that such circumstance absolved both the Stock Yard Company and the line-haul carriers from liability, is unsound for the reason that the practice condemned was that of the line-haul carriers and the Stock Yard Company uniting in an unlawful practice which rendered them jointly and severally liable to make reparation, regardless of which of them actually collected the money. The exaction complained of was brought about by the joint action of respondents acting in concert for the material advantage and benefit of each. It is the intent of the Act to Regulate Commerce to require carriers to proceed in the publication of their tariffs and in the collection of their published tariffs and charges in an open, direct and straight-forward manner, without resorting to subterfuges and indirect methods to obviate a compliance with the law..... 21

III. The outstanding question in this case is whether or not, during the period covered by the reparation order, it was the duty of the line-haul carriers under their published tariffs, construed in the light of the particular custom, usage, facts and circumstances in this case, to unload live stock at the Union Stock Yards, Chicago. Whether the determination of that question was purely one of law, or whether it was dependent upon the incidental determination by the Commission of certain underlying facts, the decision

of the Circuit Court of Appeals was clearly wrong and without judicial precedent. The determination of the question of whether it was the duty of the line-haul carriers to unload live stock at the Union Stock Yards is a matter committed to the decision of the administrative body, the Interstate Commerce Commission, which in each instance is required to fix reasonable rates and establish reasonable practices. The question of whether or not it was the duty of the line-haul carriers to unload live stock at the Union Stock Yards was a question of fact to be determined according to the actual conditions or operations at that point. Obviously, no rate for the transportation of live stock could be intelligently considered or approved or disapproved by the Commission unless it was first determined by the Commission whether the obligation to unload live stock at the Union Stock Yards was on the shipper or the line-haul carrier. The Commission is vested with the power and authority not only of determining whether a particular rate is reasonable, but also of determining the question as to whether any practice of the carrier which gives rise to the application of a rate is reasonable or lawful. (*Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477; *Los Angeles Switching Case*, 234 U. S. 294; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247.) The determination of whether it was the duty of the line-haul carriers to unload live stock consigned to petitioners at the Union Stock Yards in Chicago was dependent upon the determination of many questions purely of fact, including the history of the unloading charge, the established custom and usage at the Stock Yards with reference thereto, the relationship between the line-haul carriers and the Stock Yard Company, the

particular conditions existing at the Union Stock Yards, and the question as to whether the so-called unloading charge in fact covered other services for the exclusive benefit of the line-haul carriers. The finding of the Commission on that question should therefore have been accepted by the Circuit Court of Appeals. (*Standard Oil Co.* v. *United States*, 283 U. S. 235.) On the other hand, if the question of the duty to unload live stock at Union Stock Yards was purely a question of law, the conclusion of the Circuit Court of Appeals on that question was erroneous. It is clearly shown by the decision of this court in the case of *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, and the case of *United States* v. *Union Stock Yard*, 226 U. S. 286. Our view in this respect is also sustained by the courts generally. The Act to Regulate Commerce did not abrogate the performance by the carrier of any duty which at common law it owed the shipper or the public. Since the duty of unloading live stock is an indispensable part of the transportation of the same, it was the duty of the line-haul carrier, whether it chose to provide its own facilities for unloading live stock or to select an independent corporate entity to perform that service as its agent or instrumentality, to provide either in its line-haul rates or in a separate terminal charge for the complete transportation of live stock, including the unloading. It was the nature and character of the service performed which was controlling. Since the line-haul carriers in their published tariffs held themselves out to perform the entire transportation service for through rates and charges covering the terminal service, the fact that the terminal carrier was itself an interstate common carrier subject to the provisions of the

Act was wholly immaterial. But even if in this case it had not been the absolute common law or statutory duty of the line-haul carriers to unload live stock consigned to the Union Stock Yards in Chicago, when the line-haul carriers in their published tariffs held themselves out to perform the complete transportation service, including the unloading of live stock, and provided definite through rates and charges and a definite terminal charge to the Union Stock Yards covering compensation to themselves for the unloading service, such entire duty and all of its responsibilities became that of the line-haul carriers. The fact that the line-haul rates to Chicago, plus the charge of $2.00 for terminal or switching service constituted the through charge and included delivery of live stock to the consignee at the Stock Yards, is clearly established by the finding of the Commission (R. 144). Such fact is also admitted in the opinion of the Circuit Court of Appeals (R. 398). The line-haul rates to the Union Stock Yards in Chicago and the $2.00 per car terminal charge, except as said line-haul rates were horizontally raised, are the identical line-haul rates and terminal charge involved in *Interstate Commerce Commission* v. *Chicago, B. & Q. R. Co.*, 186 U. S. 320, and in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98. In both of these cases it appears that the line-haul rates and the terminal charge included compensation to the line-haul carriers for the unloading of live stock at the Union Stock Yards. Such fact is also uncontradictedly established by the testimony of the traffic expert called on behalf of the line-haul carriers at the hearing before the Commission. Paragraph 3 of Section 1, Paragraph 7 of Section 6, and Paragraph 3 of Section 6 of the Act to Regulate Com-

merce clearly indicate that where a line-haul carrier in its published tariffs undertakes to transport property between different points on its own route and points on the route of some other carrier, and publishes a through charge for the performance of that duty, any change which affects or disrupts the right of the shipper must be shown by a corresponding change in the published tariffs of the line-haul holding itself out to perform the entire transportation service for a through rate or charge. In such case the line-haul carrier must show any change in its own published tariffs. It cannot rely on the published tariffs of the agent which performs the terminal service for it. The general intent of the Act to Regulate Commerce is not to allow one carrier to interfere with the contract rights of the shipper growing out of his contract for through shipment with the initial carrier..... 30

IV. The Circuit Court of Appeals erred in holding that the so-called classifications in the published tariffs of the line-haul carriers and the so-called absorption clause in said published tariffs constituted the extent of the obligation of the line-haul carriers with reference to said unloading charge. The particular question determined by the Circuit Court of Appeals involved the incidental determination by the Commission of the facts with reference to the history of the charge, the custom and usage at the Union Stock Yards with reference thereto, the established relationship between the line-haul carriers and the Stock Yard Company, and the many other questions of fact hereinabove referred to. The case was one where the Circuit Court of Appeals should have accepted the findings of the Commission as to the meaning, force and effect of the published tariffs of the line-haul carriers and of the Stock

Yard Company. (*Standard Oil Co.* v. *United States*, 283 U. S. 235.) The rule is well established that tariffs prepared and filed by the carrier must be construed most strongly against the carrier and in favor of the shipper, and terminal charges will be admitted to have been waived unless it is made plain in the published tariffs of the carriers, both to the shipper and to the Commission, that the carrier is insisting upon the payment of the terminal charge..... 51

V. The Stock Yard Company, in performing the loading and unloading service, did not occupy a position analogous to that of an independent connecting carrier transporting property on its own line for a part of the distance covered by the shipment. The Stock Yard Company performed the loading and unloading service as an agent for the line-haul carriers,—performing for the line-haul carriers a service inseparably connected with the service which the line-haul carriers in their published tariffs held themselves out to perform and for which they published through rates and charges. The line-haul carriers at all times treated the Stock Yard Company as their agent, performing for them a service which they in their published tariffs held themselves out to the public to perform. The clear intent of the published tariffs of the Stock Yard Company was to restrict the application of its rates and charges to the line-haul carriers for whom it performed the unloading service as agent. The testimony before the Commission and the answers filed by the Stock Yard Company in the District Court in the instant case conclusively established this proposition. But in any event, it is wholly immaterial whether the Stock Yard Company was authorized by the line-haul carriers to publish its tariffs in such form

as to clearly indicate that the same were filed by it as the agent of the line-haul carriers and so as to make the rates and charges therein contained apply solely to the line-haul carriers, because even if not authorized so to do, the tariffs of the Stock Yard Company published in such manner could not be made the basis for any charge being made against the shipper or his consignee. While the published rates of the Stock Yard Company were its legally established rates and in that sense legal, they were not lawful as against the consignees from whom they were exacted. The distinction between a legal rate and a lawful rate is shown *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 52 Sup. Ct. Rep. 183, on page 184 59

VI. The conclusion of the Circuit Court of Appeals that the increased charge of 25 cents per car was justified by reason of the extraordinary conditions pertaining to the increased cost of labor and other expenses incidental to the unloading of live stock, was the determination of a question of fact which it was not the prerogative of that court to determine, the determination of such facts being vested exclusively in the Commission, whose determination on such question is conclusive and not subject to review by the courts, unless the Commission has acted arbitrarily or without evidence to support its conclusion, or has transcended its constitutional or statutory powers. (*Standard Oil Co.* v. *United States*, 283 U. S. 235). Furthermore, that question was not involved in this case..... 74

VII. The right of petitioners to maintain this suit may be sustained under the principles of law laid down in the *Darnell-Taenzer* case, 245 U. S. 531. The finding of the Commission, based on the determination of questions of fact, should have

been accepted by the District Court as conclusive since there was ample evidence to sustain it. Petitioners were parties directly named in the bills of lading covered by the various shipments involved in this case, who became personally liable to the line-haul carriers for all freight charges the instant they accepted delivery of the live stock, who were repeatedly recognized by respondents as the proper persons with whom to settle loss and damage claims on account of shipments of live stock consigned to them, and who directly paid the unlawful charges in controversy to respondents out of their own funds. The right of petitioners to maintain this suit is also sustained by the decision of this court in *Louisville & N. R. R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, and by the principles of law laid down in *New York Central & Hudson River Ry. Co.* v. *York & Whitney*, 256 U. S. 406. The right of either the consignor, the consignee or the owner of property to bring suit against the carriers on account of loss or injury to property shipped has always been recognized by the courts, and the right of the consignee, even though it has no pecuniary interest in the property in question, to maintain such suit has always been recognized. Plaintiffs in this case are shown by the record herein to have occupied a somewhat broader relationship to their customer shippers than that of an ordinary factor, which relationship, under the particular facts in this case, did not cease when they remitted to their customers a part only of the proceeds derived from said shipments to which their customers were lawfully entitled; by virtue of this relationship, and by their direct connection with the transportation transactions in question, petitioners had the legal right in

their own names and right to maintain said proceedings for reparation before the Commission and to maintain this suit in the District Court. The right of a factor to recover reparation on account of unreasonable or unlawful charges has been repeatedly recognized by the Commission. The right of one person having no pecuniary interest in the reparation sought to maintain a suit in his own name for the use and benefit of other persons who are the real parties in interest, and who actually sustained a pecuniary loss and injury, is in principle sustained by the decision of this court in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117. The record in this case shows that independent of the right of petitioners to maintain this suit as factors, they had express written authority from the shippers to maintain the proceedings in question, both before the Commission and in the District Court.. 75

CONCLUSION.

To allow respondents to retain the unlawful charges exacted from petitioners by means and use of the practice resorted to by respondents, would be contrary to the spirit, purpose and intent of the Act to Regulate Commerce, and would result in great injustice..... 96

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Respondents.

PETITIONERS' BRIEF ON THE MERITS.

STATEMENT OF FACTS.

On January 25, 1932, this court granted our petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division.

The opinion of the Circuit Court of Appeals is reported in 51 Fed. (2nd) 620. (R. 389)

The opinion of the District Court is reported in 39 Fed. (2nd) 80. (R. 60 to 77)

This suit is brought under Section 16 of the Act to Regulate Commerce, 41 Stat. L. 491.

The case is another chapter involving a controversy of long duration as to terminal charges of the railroads delivering live stock at the Union Stock Yards in Chicago. A history of its antecedents to the present litigation is found in *Cattle Raisers' Association* v. *Fort Worth & D. C. R. Co.*, 7 I. C. C. 513; *Cattle Raisers' Asso.* v. *C. B. & Q. R. Co.*, 10 I. C. C. 83; *Cattle Raisers' Asso.* v. *Chicago, B. & Q. R. Co.*, 11 I. C. C. 277; *Cattle Raisers' Asso.* v. *Missouri, K. & T. R. Co.*, 11 I. C. C. 296; *Cattle Raisers' Asso.* v. *C. B. & Q. R. R. Co.*, 12 I. C. C. 507; *Inter. Com. Commission* v. *Chicago, etc. Rd. Co.*, 186 U. S. 320; *Interstate Commerce Comm.* v. *Stickney*, 215 U. S. 98.

The proceedings before the Commission in the instant case involved many lengthy and protracted hearings during which the testimony of nearly a hundred witnesses was introduced. (See Original Exhibits Nos. 5-6-7-8-9-10-11-12 certified to this court as original exhibits.)

The exhibits introduced in evidence before the Commission are extraordinarily voluminous and sufficient in bulk to make a small sized truck load. (See large box and separate package of original exhibits certified to this court by the Clerk of the United States Circuit Court of Appeals.) For the convenience of this court we have compiled and caused to be printed in a volume separate from the printed record, excerpts from said original exhibits containing matters germane to the points here under discussion, which printed volume is herein referred to as "Certified Excerpts from Original Exhibits."

Petitioners brought suit as plaintiffs in the District Court to recover damages on a claim predicated on an order of the Interstate Commerce Commission awarding

reparation in the sum of $140,001.25 in favor of petitioners and against the Director General of Railroads of the United States and the Union Stock Yard & Transit Company, jointly and severally.

The order of the Commission is premised on the exaction from the plaintiffs in this suit, by the concerted action of the Director General of Railroads and the Union Stock Yard & Transit Company, of an extra charge of 25 cents per car for unloading live stock consigned to the plaintiffs at the Union Stock Yards, in Chicago, in addition to the amount for such unloading service covered by the through line-haul rates to said Stock Yards plus the $2.00 per car terminal charge in the published tariffs of the line-haul carriers, through a certain method or practice resorted to by respondents to settle a controversy between themselves concerning said extra charge.

Petitioners herein (plaintiffs in the suit in the District Court) were the consignees named in the various shipments of live stock out of which the disputed charges in this case arose, and paid each and every charge covered by the reparation order (R. 128). They were also the factors and agents of the consignors in the various shipments out of which the controverted charges arose (R. 151). The trial in the District Court was before a jury. At the close of all the evidence the court instructed the jury to return a verdict for the defendants on the sole ground that the plaintiffs were "purely volunteers" without legal right to maintain said suit (R. 77). Thereupon a judgment *nil capiat* was entered against these petitioners and for costs of suit.

Upon appeal to the Circuit Court of Appeals for the Seventh Circuit the judgment of the District Court, except as to the portions thereof relating to the awarding

of costs against the plaintiffs, was affirmed, on the ground that the practice resorted to by the line-haul carriers and the Stock Yard Company to collect the disputed extra charge of 25 cents per car from the plaintiffs was a lawful and justifiable practice (R. 389 to 399).

HISTORY OF SO-CALLED LOADING AND UNLOADING SERVICE AND CHARGES THEREFOR AND MANNER OF TREATING SAID SERVICE AND CHARGE.

In 1865 the railroads entering Chicago organized a corporation known as "Union Stock Yard & Transit Company," one of the respondents in this case. Among other things for which this corporation was organized was "to construct the necessary buildings, railroad tracks, loading and unloading platforms for the accommodation of the business of the general Union Stock Yards for cattle and other live stock, * * * to make advances of money upon such cattle and live stock for freight or other purposes, as may become expedient." (R. 123-124). (Statement of facts in *United States* v. *Union Stock Yards,* 226 U. S. 286, at page 297.)

On April 18, 1867, the Stock Yard Company established as a charge to be made by it against the line-haul carriers a loading charge of 50 cents per car and an unloading charge of 25 cents per car (R. 124). No charge was made against the line-haul carriers for the use of the tracks for the transportation of the cars of the line-haul carriers to the unloading platforms until 1894, when a charge was made against the line-haul carriers using the tracks, assessed on a per car basis, and varying to some extent with the length of the haul (R. 124). To reimburse themselves for this trackage charge and for the loading and unloading service performed by the Stock

Yard Company, the line-haul carriers published a tariff containing, in addition to the through line-haul rates to the Union Stock Yards, Chicago, a terminal or switching charge of $2.00 per car.

(See opinion of this court in *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 186 U. S. 320, at page 327, and extract from report of the Commission shown in note on pages 329 to 333.)

(See also Certified Excerpts from Original Exhibits, pp. 46, 50, 51; Original Ex. 6, pp. 511, 512; Original Ex. 7, p. 1271; Original Ex. 7, p. 1284.)

(See also *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, at page 108, where it also appears that the service of unloading live stock at the Yards was included in the $2.00 terminal charge.)

As we shall hereafter point out, the Stock Yard Company, from the time of its organization, has continuously acted as the agent of the line-haul carriers, not only in loading and unloading live stock consigned from and to the Union Stock Yards, but as their agent in collecting from the commission merchants in the Stock Yard district all transportation charges of the line-haul carriers for live stock consigned to and from the Union Stock Yards (R. 127-128). The Union Stock Yards is specifically named in the tariffs of the line-haul carriers as a station to which their line-haul rates apply (Certified Excerpts from Original Exhibits, p. 167).

For more than 50 years carriers delivering live stock at the Stock Yards in Chicago loaded and unloaded live stock, and made no charge therefor against the shipper (R. 144). The line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, for years constituted the through charge and included delivery of live stock to the consignee at the Stock Yards. (See *United*

States v. *Union Stock Yards*, 226 U. S. 286, at top of page 305.) The Commission so specifically held in the instant case (R. 144). This continued to be the uniform practice from the time the loading and unloading charge was first originated in 1867 up to May 21, 1917. On that date the Union Stock Yard & Transit Company filed new tariffs, in which it increased the amount of its loading and unloading charge to the line-haul carriers by 25 cents per car, but so as not to affect the shipper, said tariffs reciting, "The charge made by this company for the service (as a carrier's agent) of loading and unloading live stock at the Union Stock Yards at Chicago, Illinois," (R. 250-251; Original Ex. 6, pp. 316 to 341; Certified Excerpts from Original Exhibits, pp. 21 to 36 and 54 to 58).

A controversy immediately arose between the Stock Yard Company and the line-haul carriers concerning the manner of collecting this extra 25 cents per car and who should pay it, the Stock Yard Company insisting that its new tariffs, showing increased charges for the loading and unloading service, were directed against the line-haul carriers and were not applicable to the shippers, and that therefore the shippers should not be made to bear the burden of such increase (Original Ex. 6, pp. 10 to 38; Certified Excerpts from Original Exhibits, pp. 2 to 36 and 54 to 58).

In refusing to collect the additional 25 cents from the shippers or their consignees, the Stock Yard Company took the position, (1) that the duty of unloading live stock at the Union Stock Yards was that of the line-haul carriers; (2) that the Stock Yard Company sustained no such relation to the shippers which would warrant it in collecting said unloading charges, or any part thereof, from the shippers; (3) that the tariffs filed by it were

not intended to and did not affect the shippers, but were restricted to charges to be collected by it from the line-haul carriers for services performed by it "as a carrier's agent" for said line-haul carriers; (4) that the so-called unloading charge covered other services exclusively for the use and benefit of the line-haul carriers and in which the shippers could have no possible interest or benefit. (Original Ex. 6, pp. 10 to 38; Certified Excerpts from Original Exhibits, pp. 2 to 36 and 54 to 58.)

In accordance with this position the Stock Yard Company collected the freight bills of the line-haul carriers, figured on the basis of the line-haul rates plus the $2.00 terminal charge specified in the published tariffs of the line-haul carriers, but refused to collect the additional 25 cents per car from the consignees, because it was not set up on the freight bills of the line-haul carriers and because the charges in the Stock Yard Company tariff were restricted to its charges "as a carrier's agent" against the line-haul carriers and did not justify the collection of such charges from the shipper. The Stock Yard Company forced the line-haul carriers to pay the increase of 25 cents per car by withholding 25 cents per car from the freight bills of the line-haul carriers collected by it as their agent. At that time the freight bills of the line-haul carriers did not include the controverted additional charge. Thereupon the line-haul carriers threatened to collect their own freight bills in order to prevent the Stock Yard Company from withholding the additional 25 cents per car. (Original Ex. 6, pp. 472-476; Certified Excerpts from Original Exhibits, pp. 37-40.)

THE PRACTICE RESORTED TO BY RESPONDENTS TO EXACT FROM THE SHIPPER THE EXTRA 25 CENTS PER CAR IN DISPUTE AND DECLARED UNLAWFUL BY THE COMMISSION AND HELD TO BE LAWFUL BY THE CIRCUIT COURT OF APPEALS.

To settle the controversy and to furnish the basis to justify the collection of the controversial extra 25 cents per car, the Stock Yard Company and the line-haul carriers agreed upon the following practice: The line-haul carriers did not amend their tariffs (R. 390), but after making out their freight bills on the basis of the line-haul rates and said $2.00 terminal charge specified in their published tariffs, added to the amount of freight charges thus ascertained the additional charge of 25 cents per car not mentioned in their published tariffs; the freight bills thus made out immediately after each shipment was unloaded were turned over for collection by the line-haul carriers to their agent, the Stock Yard Company; twice each week—on Monday and Thursday—the Stock Yard Company collected from the petitioners herein the amount of the total freight charges of the line-haul carriers then due, including the controversial extra charge of 25 cents per car, and on Monday of each succeeding week turned over to the line-haul carriers the entire amount thus collected without deduction. Thereafter, once each month, the line-haul carriers paid the Stock Yard Company the total amount of its loading and unloading charges for the previous month on the basis of the increased charges set forth in the new tariffs filed by the Stock Yard Company. The result of the practice was that respondents settled the controversy between themselves as to the extra charge of 25 cents per car by exacting it from petitioners. (Original Ex. 6, pp. 472-476; Certified Excerpts from Original Exhibits, pp.

37-40; Original Ex. 6, pp. 10 to 38; Certified Excerpts from Original Exhibits, pp. 2 to 21; Original Ex. 6, pp. 496, 497, 579; Certified Excerpts from Original Exhibits, pp. 40-41, 51 to 58.) *This is the practice referred to in the report of the Commission* (R. 123), *and the practice which was declared unlawful and unreasonable by the Commission* (R. 145). The practice inaugurated by the Stock Yard Company and the line-haul carriers before the period of Federal Control was continued by the Director General of Railroads during the entire period of Federal Control (R. 217-218).

NATURE OF OPERATION AND ENUMERATION OF DIVERS SERVICES COVERED BY THE SO-CALLED LOADING AND UNLOADING CHARGES.

The record shows, without contradiction, that the so-called loading and unloading charges cover compensation to the Stock Yard Company not only for the performance of the loading and unloading service at the Union Stock Yards, but cover divers other services rendered for the sole use and benefit of the line-haul carriers. The matter of the handling of shipments of live stock from the time the live stock trains arrive at the unloading chutes of the Stock Yard Company involves not merely the unloading of the live stock, but involves a joint operation and concert of action between the employees of the line-haul carriers and the employees of the Stock Yard Company. This joint operation, at the time covered by the charges exacted in this case, is described in the present tense as follows (Certified Excerpts from Original Exhibits, pp. 22 to 33):

The shipments of live stock are invariably consigned to a commission firm located within the confines of the

Union Stock Yards district. The line-haul carrier in completing its haul to the billed destination hauls the train of live stock to the chutes of the Stock Yard Company with its own power and its own train crew. The stock is then unloaded by employees of the Stock Yard Company. While the cars are being unloaded the conductor of the line-haul carrier in charge of the train takes the waybills of the line-haul carriers and the live stock stubs thereto attached to the Clerk of the Division Office of the Stock Yard Company, who in turn hands them to an employee of the Stock Yard Company in the order in which they are received. This employee, referring to the waybills and attached live stock stubs, from a pulpit provided for that purpose, calls the car numbers, contents and names of the consignees to the waiting commissionmen's employees, thus giving notice of the arrival of the stock to the commissionmen. The waybills and live stock stubs are then turned back to the Clerk of the Division Office of the Stock Yard Company, where a permanent record, known as the "Yard Book", is made, and which is thereafter the official record of the line-haul carriers of the receipt of the live stock contained in the live stock trains. At the same time a bulletin is prepared, showing the name of the consignor, consignee, car number, and contents of the car by classes of animals—cattle, horses, hogs or sheep. After the permanent record and bulletin are made, the waybills and live stock stubs are returned by a messenger of the Stock Yard Company to the line-haul carriers' local representative, who in turn forwards the same to the Western Weighing Association Bureau (a bureau of the line-haul carriers) for the purpose of securing data concerning the actual weight of the contents of the cars unloaded. The Association Bureau then forwards the waybills and

live stock stubs attached to the respective commission merchants named as consignees in the various shipments, who insert the weight of the animals and return the same to the Western Weighing Association Bureau, which in turn sends the same back to the local representative of the line-haul carrier for final revision. After the final revision is made by the line-haul carriers, the waybills and live stock stubs attached are sent to the accounting office of the Stock Yard Company, where the debits and credits evidencing the amount due from the commissionmen to the line-haul carriers for the total amount of the freight charges involved in such shipment are recorded.

As a part of this joint operation the Stock Yard Company—

(a) Guarantees the collection of the total freight charges of the line-haul carriers from the commissionmen, consignees named in said shipments;

(b) Makes a systematic count of the contents of each car regarding the number of dead and crippled animals therein, and makes a final record of such facts on which the line-haul carriers rely in the settlement of claims against them for injured, dead and missing animals;

(c) Removes the dead animals from the cars;

(d) Collects and turns over to the line-haul carriers, without deduction, the total amount of the line-haul carriers' freight charges.

(Certified Excerpts from Original Exhibits pp. 22 to 33.)

For all of the services performed in said joint operation and in the particular service hereinabove set forth the Stock Yard Company is directly paid by the line-haul carriers the amount of the so-called loading and unloading charges set forth in the published tariffs of

the Stock Yard Company, plus in some instances the charge for weighing. (R. 127) (See Certified Excerpts from Original Exhibits, pp. 61 to 64, 68.)

STOCK YARD COMPANY MADE NO ATTEMPT TO MERELY CANCEL THE INCREASED CHARGES CONTAINED IN ITS TARIFF OF MAY 21, 1917, INDEPENDENTLY OF THE ATTEMPT TO WITHDRAW ALL TARIFFS AND MAKE THE LOADING AND UNLOADING SERVICE THE SUBJECT MATTER OF PRIVATE CONTRACT BETWEEN STOCK YARD COMPANY AND LINE-HAUL CARRIERS.

The adoption of the practice resorted to by the line-haul carriers and the Stock Yard Company, to exact the controversial extra 25 cents per car from the shipper, created such a furor among the commission men at the Union Stock Yards that the Stock Yard Company, on September 1, 1917, made application to the Interstate Commerce Commission not only to withdraw its new tariffs of May 21, 1917, *but to withdraw all of its published tariffs, inseparably coupled with a request to the Commission to approve its proposed plan of making the entire subject of loading and unloading charges a matter of private operating arrangements between the Stock Yard Company and the line-haul carriers* (R. 250-251). Simultaneously with the filing of said application to withdraw all published tariffs and for the approval of the Commission to make the entire subject matter of loading and unloading charges a matter of private operating arrangements between the Stock Yard Company and the line-haul carriers, the Stock Yard Company sent to each of the common carriers entering the City of Chicago a letter stating, among other things, the following:

> "The loading and unloading docks and platforms of the Union Stock Yard & Transit Company of Chicago are nothing more or less than the terminals of

> the lines handling live stock for delivery within this District; and therefore the attempt on the part of the Stock Yard Company to cover the use of these facilities by a tariff, instead of placing the same on an operating basis is and always has been a mistake."

(R. 251; Certified Excerpts from Original Exhibits, pp. 5-6)

In the same letter it was stated:

> "The directors of the Union Stock Yard & Transit Company of Chicago have determined to cancel, and have cancelled their so-called tariff • • • heretofore filed with the Interstate Commerce Commission, and to make a rental charge for the terminal facilities furnished to and used by the lines carrying live stock to and from this market."

(R. 251; Certified Excerpts from Original Exhibits, pp. 5-6)

PETITIONERS PAID THE UNLAWFUL CHARGES.

Petitioners were specifically named as consignees in the bills of lading covering all of the shipments involved in this case. Upon arrival of the cars at the Union Stock Yards, petitioners as such consignees either paid or directly assumed all transportation charges. Such transportation charges, including the unlawful charges in question, were paid by petitioners by bank checks drawn on their individual bank accounts. (Certified Excerpts from Orig. Ex., p. 156—Original Ex. 8). Afterwards they, in their own names and right, as factors, sold the live stock consigned to them, and after deducting all freight and other expenses, including the unlawful charges in question, either remitted the proceeds to the consignor or credited the amount on the consignor's account. (R. 151, 329 to 331; Original Ex. 8, pp. 25 to 96

and 96 to 134; Original Ex. 9, pp. 21 to 685; Certified Excerpts from Original Exhibits, pp. 136 to 156.)

In the various hearings before the Commission there was a vast amount of testimony introduced showing in detail the relationship between the commission merchants, members of the Chicago Live Stock Exchange, and the shippers whose rights were involved in the various shipments out of which the claims for overcharges arose, the established custom existing between such commission merchants, members of said Chicago Live Stock Exchange, and the shippers shipping live stock into the Union Stock Yards, with reference to the duty and authority of the members of the Exchange to present and prosecute, for and on behalf of the shippers, claims for injuries to stock and overcharges in freight and feeding bills, and with reference to the particular authority and authorization of the plaintiffs in this case to present and prosecute these particular claims for reparation for and on behalf of said shippers. Testimony as to such matters is shown throughout the voluminous testimony taken before the Commission in the various hearings of the matters involved in this case. (Certified Excerpts from Or. Ex. 90, 92; Original Exhibit 8, pp. 25 to 96)

Testimony showing said established custom existing between said commission merchants, members of said Chicago Live Stock Exchange, and the shippers shipping live stock into said Union Stock Yards, with reference to the duty and authority of the members of the Exchange to present and prosecute, for and on behalf of the shippers, claims for injuries to stock and overcharges in freight and feeding bills, and with reference to the particular authority and authorization of the plaintiffs in this case to present and prosecute the particular claims for reparation involved in this case for and on behalf of

said shippers, is also shown by the testimony of fifty of said commission men at the hearing before said Interstate Commerce Commission on October 3, 1922, as shown by Defendants' Original Exhibit 9, referred to on page 270 of the Record, and by the testimony of twelve other members of said Chicago Live Stock Exchange, who testified to the same effect at the hearing before said Interstate Commerce Commission in this cause on October 9, 1922, said testimony being contained in Defendants' Original Exhibit 10, referred to on page 270 of the Record, and by thirty members of said Chicago Live Stock Exchange who testified before the Commission at the hearings on November 6, 7, 8 and 9, 1922, said testimony being contained in Defendants' Original Exhibit 11, referred to on page 271 of the Record.

The testimony of H. R. Park, on July 14, 1921, (Original Ex. 8, pp. 96 to 126) shows not only a custom prevailing making it the duty of the commission men, members of the Chicago Live Stock Exchange, in presenting and prosecuting, in behalf of the shippers of live stock to the Union Stock Yards, claims for injuries to stock and overcharges in freight and feeding bills, *but also shows the express authorization by all of the shippers of shipments covered by the claims presented by the plaintiffs in this case and filed with the Interstate Commerce Commission in behalf of said shippers.* (Certified Excerpts from Original Exhibits, p. 140, 153.)

In its order of June 2, 1925, the Commission specifically found (R. 151):

> "We find that the following individuals, copartnerships and corporations, parties of record, made the shipments as described in this and our preceding reports, and paid the charges thereon herein and heretofore found to be unreasonable and unlawful; that they have been damaged in the amount of such

charges, and are severally entitled to reparation as factors and agents for the shippers, with interest from date of payment."

This finding is followed by an enumeration of the names of the plaintiffs in this case.

On December 12, 1927, the Commission filed in said Consolidated Nos. 9977 and 12614, its order (R. 158-208) supplementing its order of June 2, 1925, specifically fixing the several amounts to which said commission men and members of said Chicago Live Stock Exchange were entitled to recover by way of reparation, the aggregate amount of said order of reparation being $140,001.25 over and above the amounts assessed against the line-haul carriers for exaction of the disputed charge during the period immediately prior to the period of Federal Control which latter amounts were paid before this suit was instituted in the District Court. The said order of December 12, 1927, recites that it is based upon the report of June 2, 1925, which report is "hereby referred to and made a part hereof."

The plaintiffs in the petition filed in the District Court to recover damages based on said award of reparation are the commission men and members of the Exchange specifically named in said order of December 12, 1927 (R. 157-208), and who are also specifically mentioned and described in the order of the Commission of June 2, 1925 (R. 147-156), and in the complaint filed by the Chicago Live Stock Exchange in I. C. C. Docket No. 12614 (R. 258-265); and who, though not specifically named in the complaint filed by the Chicago Live Stock Exchange in I. C. C. Docket No. 9977 (R. 243-256), are referred to and described as members of the Chicago Live Stock Exchange in whose behalf said complaint states it is filed.

Respondents in the District Court introduced substan-

tially no evidence other than the testimony taken before the Interstate Commerce Commission and the various complaints and exhibits filed with the Commission.

Specification of Errors.

1. The Circuit Court of Appeals erred in not accepting as conclusive the finding of the Commission based on sufficient evidence that the duty of unloading live stock at the Union Stock Yards was a duty of the line-haul carriers, and in substituting its judgment for that of the Commission in holding that such duty was on the shipper.

2. The Circuit Court of Appeals should have accepted as conclusive the finding of the Commission that "the line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for many years constituted the through charge and included delivery of live stock to the consignee at the Stock Yards," inasmuch as the determination of that question was inseparably bound up with the determination of questions of fact involving not only a construction of the language of a multitudinous mass of complicated tariffs, classifications and supplements, but voluminous facts involving the history of the unloading charge, the relation of the unloading service with other services performed by the Stock Yard Company for the exclusive use and benefit of the line-haul carriers, and other questions of fact.

3. The Circuit Court of Appeals should have accepted as conclusive the finding of the Commission based upon sufficient evidence and involving an administrative matter to the effect that the practice resorted to by respondents to collect from petitioners the extra 25 cents per car was an unlawful and unreasonable practice.

4. The Circuit Court of Appeals erred in its conclusion that the collection of the charges complained of

was made by respondent Stock Yard Company, and that such fact absolved the line-haul carriers from any liability to petitioners arising out of the exaction of the controversial extra charge of 25 cents per car for unloading live stock through the practice adopted by the line-haul carriers and the Stock Yard Company to exact said charge from petitioners.

5 The Circuit Court of Appeals erred in holding that the Stock Yard Company was compelled by law to collect from petitioners the extra 25 cents per car in controversy.

6. The Circuit Court of Appeals erred in holding that the increased charge of 25 cents per car was justified by reason of the extraordinary conditions existing at the time said charges were collected and on account of the increased cost of labor and other expenses connected with said unloading service for the following reasons:

(a) The court had no power or authority to determine that question of fact.

(b) If the court had such power, it could not determine that question without taking into consideration the uncontradicted fact that the line-haul rates of the line-haul carriers, which included a part of the unloading charge, were on account of the very conditions mentioned by the Circuit Court of Appeals increased three successive times, the first increase being 5 per cent, the second increase being 15 per cent, and the third increase being 25 per cent, of the theretofore existing line-haul rates.

7. The Circuit Court of Appeals erred in affirming the judgment of the District Court predicated on the theory that petitioners had no right to maintain the proceedings in question before the Interstate Commerce Commission and to prosecute said suit in the District Court for damages on account of the exaction from them of the unlawful 25 cents per car.

ARGUMENT.

I.

STATEMENT OF FUNDAMENTAL PROPOSITION INVOLVED.

The underlying fundamental proposition in this case is that it is an action in tort brought against respondents as joint tort feasors on account of the exaction from petitioners of unlawful charges by the means and use of an unlawful practice resorted to by respondents to exact from petitioners an extra 25 cents per car for the unloading of live stock at the Union Stock Yards in Chicago in order to settle a controversy between themselves with reference to said extra charge.

That practice was unreasonable and unlawful for the following reasons:—

(1) The published tariffs of the line-haul carriers undertook the complete transportation of live stock to the Union Stock Yards at Chicago for a through rate or charge therein provided for such complete transportation, including the unloading thereof, and therefore the right of the shipper growing out of such published tariffs of the line-haul carriers could not be disturbed or increased except by a change made in the published tariffs of the line-haul carriers (Certified Excerpts from Original Exhibits, pp. 167-169).

(2) That said extra charge of 25 cents per car as against the shippers of live stock was an unauthorized and unlawful charge, because the imposition of the same upon the shippers was not justified either on the basis of the published tariffs of the line-haul carriers or on the basis of the published tariffs of the Stock Yard Company

(Certified Excerpts from Original Exhibits, pp. 77, 78, 79).

(3) The Stock Yard Company in performing this service was acting as a mere agency or instrumentality of the line-haul carriers in the performance of such unloading service; in such case it is not consistent with the spirit and intent of the Act to Regulate Commerce that the identical service of unloading live stock undertaken and charged for in the published tariffs of the line-haul carriers should be also made the subject matter of the independent control and charge of the agency or instrumentality performing that service;

(4) Under the particular facts and circumstances in this case, the exaction from petitioners, through the joint action and cooperation of the line-haul carriers and the Stock Yard Company, was a wrongful and tortious act which rendered respondents jointly and severally liable to make reparation on account of the unauthorized charges exacted from petitioners as a result of such practice, regardless of which of them in the first instance actually or physically received such charges.

This underlying fundamental proposition must be kept in mind in the consideration of this case, both with reference to the right of petitioners to maintain this suit and with reference to the liability of each of the respondents for the acts of each other in the promulgation of the practice adopted by them.

II.

THE CIRCUIT COURT OF APPEALS SHOULD HAVE ACCEPTED AS CONCLUSIVE THE FINDING OF THE COMMISSION BASED UPON SUFFICIENT EVIDENCE AND INVOLVING A PURELY ADMINISTRATIVE MATTER TO THE EFFECT THAT THE PRACTICE RESORTED TO BY RESPONDENTS TO COLLECT FROM PETITIONERS THE EXTRA 25 CENTS PER CAR WAS AN UNLAWFUL AND UNREASONABLE PRACTICE.

It appears reasonably certain from a reading of the opinion of the Circuit Court of Appeals that the court did not fully understand what the practice resorted to by respondents to exact the controversial extra 25 cents from petitioners really was. In order to properly understand what that practice was it is necessary to read the reports and findings of the Commission in the light of the evidence introduced before the Commission.

From the opinion of the Circuit Court of Appeals it clearly appears that the court was laboring under the impression that the practice condemned was that of setting up in published tariffs a separate terminal charge covering the unloading service. This is made apparent by the following language of the opinion (R. 395):

> "Since the passage of the Interstate Commerce Act, the right to make separate terminal charges seems clear, but with a limitation that such charges if themselves reasonable, must not, in connection with all the other transportation rates, produce an unreasonable aggregate."

We do not now contend, and never have contended, that a terminal service such as the unloading of live stock may not be properly set up in the published tariffs of a common carrier in a separate terminal charge in addition to its line-haul or commodity rates and charges. That this may be done admits of no doubt. Nor is there

any doubt as to the law that such terminal charges, if reasonable in themselves, and in connection with other transportation rates produce a reasonable aggregate for the performance of the entire transportation service, are proper and will be sustained. (*I. C. C.* v. *C. B. & Q. R. R.*, 186 U. S. 320; *I. C. C.* v. *Stickney*, 215 U. S. 98.) But the practice condemned by the Commission and held to be unreasonable and unlawful was something wholly different from that merely of setting up the charges for the unloading service in a separate terminal charge. The practice resorted to by respondents to exact from petitioners the extra 25 cents per car in controversy and condemned by the Commission, and the facts which caused the adoption of such practice, are indisputably shown by the record before the Interstate Commerce Commission to be as stated in our statement of facts, *supra*, p. 8.

The unlawfulness or unreasonableness of the practice resorted to by respondents must be considered in the light of the facts and circumstances in the case, including the relationship between the line-haul carriers and the Stock Yard Company as it had existed for half a century, and the history of the unloading charge and the established custom and usage with reference thereto.

The approval by the Circuit Court of Appeals of the practice involved is without precedent. It establishes the precedent that a line-haul carrier who has for fifty years assumed the entire burden of the expense connected with the performance of a terminal service, and who has during such time continuously performed such service through the instrumentality of an agent, and who, ever since the enactment of the Act to Regulate Commerce, has in its published tariffs established through rates which included the terminal service, may, without

changing its published tariffs, lawfully unite with the agency performing the terminal service in a practice whereby there is exacted from the shipper an additional charge over and above the through rate specified in the published tariffs of the line-haul carrier.

Counsel for respondents contend that the Circuit Court of Appeals in its opinion made no reference to this question, and that therefore such proposition is not before this court for review. The appeal in this case is from the decision of the Circuit Court of Appeals and not from its opinion; since, therefore, the necessary result of that decision is to produce this result as applied to the particular facts in the case, that question is properly before this court for review.

PETITIONERS HAVE NEVER ADMITTED THAT CHARGES OF STOCK YARD COMPANY WERE EITHER REASONABLE, PROPER OR LAWFUL.

In the brief filed by respondent Union Stock Yard & Transit Company in opposition to petition for writ of certiorari, it is repeatedly said, with differing phraseology, that it seems to be conceded in the petition and brief in support thereof that the collection of the charges of the Yards Company was proper. For example, on page 22, it is said:

> "The entire argument made to this court is that the Director General should be required to pay the increased charges of the Yards Company, there being no contention that the retention and collection of those charges by the Yards Company was improper."

We emphatically deny this conclusion, and regret the attempt to obscure the issues. Our contention is, and always has been, that the exaction from the shipper or

consignee of the controversial extra 25 cents per car, through the means and by the use of the practice resorted to by respondents to settle between themselves a controversy with reference to that charge, was improper and unlawful, both on the part of the Stock Yard Company and of the line-haul carriers; that in the promulgation of said practice they were joint tort feasors, engaged in a common enterprise, and that it is wholly immaterial in this case which of them in the first instant collected the unlawful charge, and which of them retained it; that the wrong done was the exaction of the unlawful charge regardless of who received it or benefitted by it. (*Louisville N. R. Co.* v. *Sloss-Sheffield*, 269 U. S. 217.)

The Stock Yard Company justified the collection of the extra 25 cents per car on the ground that its authority to make such collection was contained in the freight bills turned over to it for collection by the line-haul carriers. The Stock Yard Company was charged with notice that the extra 25 cents per car endorsed on the freight bills of the line-haul carriers was not justified by the published tariffs of the line-haul carriers, and presumed to know that if it united with the line-haul carriers to exact from the shipper a charge not justified by the published tariffs of the line-haul carriers, that both it and the line-haul carriers would be jointly and severally committing a tort against the person from whom the charge was collected, which rendered both jointly and severally liable to make reparation. (*Lewis* v. *Southern Pacific Co.*, 283 U. S. 654.)

QUESTION AS TO WHETHER LINE-HAUL CARRIERS SHOULD HAVE ABSORBED THE INCREASED CHARGES OF THE YARDS COMPANY IS NOT INVOLVED.

Nor should the issue in this case be confused by the oft-repeated assertion of counsel for both respondents that the real question in this case is whether or not the line-haul carriers were legally required to absorb the increase of 25 cents per car in the published tariffs of the Stock Yard Company. That was the bone of contention and issue between the Stock Yard Company and the line-haul carriers before the adoption of the practice resorted to by respondents to settle that controversy. However, the moment respondents, by joint and concerted action, by the means and use of the practice resorted to by them, exacted from the consignees at the Stock Yards the extra 25 cents per car, the question of whether the line-haul carriers could be compelled to absorb the additional 25 cents per car entirely disappeared, and the sole issue which remained was whether or not the Stock Yard Company and the line-haul carriers, by exacting the controversial extra 25 cents per car from the consignees at the Stock Yards, through the joint practice resorted to by them, were liable, jointly and severally, to make reparation on account of such exaction. As we have heretofore pointed out, the determination of that question did not involve, one way or the other, the unreasonableness of any charge in the published tariffs of the Stock Yard Company from the standpoint of being excessive. Manifestly, the collection of a reasonable charge from the standpoint that it is not excessive for the service performed may be unlawful because not set up in published tariffs, as required by law, or because the same is collected from a person or

corporation other than the one from whom the published tariffs provide it shall be collected.

We are not, however, conceding that the charge considered by itself was reasonable. But whether it was or was not is wholly immaterial in this case.

THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS THAT THE STOCK YARD COMPANY IN EFFECT COLLECTED THE CONTROVERSIAL CHARGE FROM THE SHIPPER OR CONSIGNEE, AND THAT SUCH CIRCUMSTANCE ABSOLVED BOTH THE STOCK YARD COMPANY AND THE LINE-HAUL CARRIERS FROM LIABILITY, IS UNSOUND.

By an ingenuous process of reasoning the Circuit Court of Appeals arrives at the conclusion that the Stock Yard Company, being a common carrier, was required to publish its tariffs of rates and charges and under penalty of law compelled to collect the same; that the practice resorted to by the Stock Yard Company and the line-haul carriers to exact the controversial extra 25 cents per car from the consignees merely resulted in the Stock Yard Company obtaining the extra 25 cents per car which it was compelled to do under its published tariffs, and that the practice condemned by the Commission was therefore lawful. The court, in coming to this conclusion completely overlooked the object, purpose and effect of the practice.

The wrong perpetrated by the Stock Yard Company was this:— Knowing that the rates and charges for the loading and unloading service contained in its published tariffs were charges applicable only to the line-haul carriers for whom it performed the loading and unloading service as agent, and knowing, or being charged with notice, that under the published tariffs of

the line-haul carrier the shipper had the right, upon payment of the through rates and charges therein specified, to the complete transportation of his live stock to the Union Stock Yards, including unloading, it nevertheless joined with the line-haul carriers in a practice whereby the 25 cents per car in controversy between it and the line-haul carriers was added to the line-haul carriers' freight bills and collected from petitioners herein,—with the necessary result that there was exacted from petitioners 25 cents per car more than that set up in the published tariffs of the line-haul carriers for the entire transportation service including unloading.

The gist of the wrong done was the violation of the shipper's right growing out of the published tariffs of the line-haul carriers with whom he contracted.

It is wholly immaterial whether, as a result of this practice, the Stock Yard Company actually received more than it was entitled to receive or legally compelled to collect for the service rendered. The cause of action in this case arose against the Stock Yard Company and the line-haul carriers not because of the receipt by them, or either of them, of the unlawful charge; the wrong done which gave rise to the cause of action, was the exaction from the consignees of the shipments in question of the unlawful charge regardless of who received it or benefited by it. (*Louisville N. R. Co.* v. *Sloss-Sheffield*, 269 U. S. 217.)

However, both the Stock Yard Company and the line-haul carriers were directly benefited by the result of the practice resorted to. When the Stock Yard Company filed its increased tariffs on May 21, 1917 directed against the line-haul carriers for service which it performed for them as their agent and the line-haul carriers refused to pay the increase, the Stock Yard Com-

pany was confronted with the necessity of bringing the controversy between it and the line-haul carriers to the Interstate Commerce Commission for its determination. This the Stock Yard Company did not want to do because by so doing it would subject itself and its business with the line-haul carriers to the jurisdiction of the Commission, thus militating against its contention that it was not a common carrier subject to the provisions of the Act to Regulate Commerce and that the matter of its rates and charges for services rendered the line-haul carriers at the Union Stock Yards was a matter of private agreement or contract between itself and the line-haul carriers. On the other hand, the line-haul carriers, when confronted with the increase in the loading and unloading charge made against them in the published tariffs of the Stock Yard Company, could have brought the controversy between itself and the Stock Yard Company before the Interstate Commerce Commission for its determination. This the line-haul carriers did not want to do because then one of the questions before the Commission would have been whether the line-haul rates to the Union Stock Yards plus the $2.00 per car terminal charge (in view of the fact that the line-haul rates had been increased by flat raises of 5 per cent, 15 per cent and 25 per cent, respectively) were sufficient to require the line-haul carriers to absorb the increase made in the published tariffs of the Stock Yard Company. If the line-haul carriers had not added the additional 25 cents per car to their freight bills, the same would not have been exacted from the shipper. On the other hand, if the Stock Yard Company had not collected the 25 cents per car from the shipper on the basis of an arbitrary charge of that amount on the freight bills of the line-haul carriers, it

would never have been exacted from the shipper. Furthermore, if the Stock Yard Company had acquiesced in the threat of the line-haul carriers and thereupon the line-haul carriers had collected their own freight bills from the consignees, the extra 25 cents per car would not have been exacted from said consignees and the Stock Yard Company would have been compelled to collect the increase from the line-haul carriers or file a complaint with the Commission. This accounts for the willingness of the Stock Yard Company to join in the practice condemned by the Commission.

Clearly, the joint concerted action of respondents in exacting from the shipper the 25 cents per car in question rendered them jointly and severally liable to make reparation regardless of which of them may be said to have collected the same, and regardless of which of them benefited thereby. It is elementary that there is no agency in the commission of a tort. All who unite in the commission of a tort are jointly and severally liable as principals to the one in whom the cause of action is vested.

It is the intent of the Act to Regulate Commerce to require the carriers to proceed in the publication of their tariffs and in the collection of their published rates and charges in an open, direct and straight-forward manner. It does not tolerate circuitous methods or subterfuges to accomplish indirectly what cannot be lawfully accomplished directly. It does not countenance a "sleight-of-hand" practice whereby the shipper is compelled to pay a charge not justified by the published tariffs of the principal with whom he contracts for the complete transportation of his live stock; especially is this true under the particular facts and circumstances in this case.

The proper and lawful thing for the Stock Yard Com-

pany and the line-haul carriers to have done when the controversy between them arose as to the increase of 25 cents per car in the published tariffs of the Stock Yard Company, was to have referred that matter to the Commission for its decision. They chose, however, for reasons deemed sufficient by themselves, to avoid the determination of the controversy by the Interstate Commerce Commission and to resort to the practice of settling the controversy by saddling the extra 25 cents per car on the shipper.

III.

THE CIRCUIT COURT OF APPEALS ERRED IN NOT ACCEPTING AS CONCLUSIVE THE FINDING OF THE COMMISSION BASED ON SUFFICIENT EVIDENCE THAT THE DUTY OF UNLOADING LIVE STOCK AT THE UNION STOCK YARDS WAS A DUTY OF THE LINE-HAUL CARRIERS, AND IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COMMISSION IN HOLDING THAT SUCH DUTY WAS ON THE SHIPPER.

While all of the questions involved are more or less inextricably bound up with each other, in our judgment the outstanding question in this case is whether or not, during the period covered by the reparation order in this case it was the duty of the line-haul carriers, under their published tariffs, construed in the light of the particular custom, usage, facts and circumstances in this case, to unload live stock at the Union Stock Yards in Chicago. The items for which reparation is sought being confined exclusively to unlawful charges exacted from petitioners, growing out of the unloading of live stock at the Union Stock Yards in Chicago, the question involved concerns the duty of the line-haul carriers to unload live stock at that particular point. The question as to the

duty of the line-haul carriers to unload live stock at any other station or point is not involved.

The first question which arises on this phase of the case is: Is the determination of the question of the duty of the line-haul carriers under their published tariffs construed in the light of the particular facts and circumstances in this case, including the history of the unloading service at the Union Stock Yards, purely a question of law, or is it a question of mixed law and fact?

If it is a question purely of law, we concede that the Circuit Court of Appeals had the undoubted right to substitute its judgment for that of the Commission on that question, subject, of course, to review by this Court. On the other hand, if the determination of that question is not purely a question of law, but a question dependent upon the facts, or is a mixed question of law and fact, the Circuit Court of Appeals was without power or authority to substitute its judgment for that of the Commission on that subject. Whether the determination of that question was purely a question of law, or whether it was dependent upon the determination of facts, it is our contention that the Circuit Court of Appeals, in arriving at the conclusion that such duty was on the shipper, except to the extent the line-haul carriers in the absorption clauses in their published tariffs had assumed a part of the expense involved in the performance of that duty, was clearly wrong and without judicial precedent.

THE QUESTION AS TO WHETHER IT WAS THE DUTY OF THE LINE-HAUL CARRIERS OR OF THE SHIPPERS TO UNLOAD LIVE STOCK AT THE UNION STOCK YARDS IN CHICAGO WAS A QUESTION NECESSARILY DEPENDENT UPON THE DETERMINATION OF PARTICULAR FACTS RELATIVE TO THE HISTORY OF THE UNLOADING CHARGE, THE ESTABLISHED CUSTOM AND USAGE WITH REFERENCE THERETO AT THE UNION STOCK YARDS, AND OTHER INCIDENTAL FACTS.

We concede that where the only question involved is the meaning of the language of a published tariff, the determination of that question is ordinarily a question of law, the same as where the question of the meaning of any other instrument in writing is involved. But where the construction of a tariff is dependent upon the incidental determination of certain underlying facts, the question of the construction of a tariff is not then purely a question of law.

This rule is well stated by Mr. Justice Brandeis in *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, on page 291:

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution."

On page 292 this court says:

> "But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made

by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy."

The rule as established by this court is that where an adequate consideration of the controversy requires acquaintance with many intricate facts of transportation and a subsequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or charges, or allowances, which may be made to shippers for instrumentalities supplied and services rendered, the question is not one purely of law, but is a question primarily for the determination of the Commission. (See *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, at page 294.)

It is obvious that the Circuit Court of Appeals, in reaching the conclusion that it was the duty of the shipper to unload live sctock at the particular time and place in question, substituted its judgment for that reached by the Commission in its final reports, findings and orders. In so doing that court overlooked the law repeatedly laid down by this court that what constitutes "reasonable necessities of transportation at a given place and time" and what are or are not reasonable practices in regard to the collection of rates and charges are matters inseparably connected with the rate-making power committed to the Commission. Obviously, no rate for the transportation of live stock can be intelligently considered and approved or disapproved by the Commission unless, as one of the necessary conditions precedent, it is determined by the Commission whether the obligation to unload live stock at the point of destination is on the shipper or on the line-haul carrier. If the obligation rests upon the shipper, then no compensation to the carrier for such service can be included in the rates and charges in the published tariffs of the line-haul carriers.

On the other hand, if the unloading service is a part of the general transportation service which it is the duty of the carrier to provide, a proper allowance must be made for such unloading service in the published tariffs of the line-haul carriers. Necessarily, therefore, the determination by the Circuit Court of Appeals that the duty to unload live stock at the place and time in question was on the shipper was a determination of one of the questions of fact necessarily incidental to the function of rate-making which Congress has committed to the administration of the Commission and not to the court.

In *Atchison, T. & S. F. Ry. Co.* v. *United States,* 232 U. S. 199, one of the questions raised was whether the court in reviewing an order of the Interstate Commerce Commission could interfere with the judgment of the Commission holding that transportation of ice to the refrigerator cars of the carriers was a part of the transportation transaction contemplated by Section 1 of the Interstate Commerce Act. On page 220 it is said:

> "these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such power. They cannot make rates. They cannot interfere with rates fixed or practices established by the Commission, unless it is made plainly to appear that those ordered are void."

See *Interstate Commerce Commission* v. *Delaware, L. & W. R. R. Co.,* 220 U. S. 235.

See *Los Angeles Switching Case,* 234 U. S. 294, where the court on pages 310 and 311 says:

> * * * "it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a

substituted service which is substantially a like service to that included in the line-haul rate and not received, *is a question of fact to be determined according to the actual conditions of operation.* Such a question is manifestly one upon which it is the province of the Commission to pass. We must therefore take the findings of the Commission in the present case as to the character and manner of use of the industrial spurs in Los Angeles— * * * —as conclusions of fact. Assuming that they were based upon evidence, they are not open to review." (Italics ours.)

In *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, the court says:

"In considering administrative questions as to reasonableness the elements of the problem are the same whether they involve the validity of obsolete allowances, discarded tariffs, or current rates and *practices.* In both cases there is a call for the exercise of the rate-regulating discretion and the same necessity for having the matter settled by a single tribunal." (Italics ours.)

In *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, it is said:

"The rule which requires a preliminary determination of administrative questions by the Commission applies not only to those cases where the question involved is whether a particular rate is reasonable or whether a particular practice is discriminatory, *but likewise to any practice of the carrier which gives rise to the application of a rate.*" (Italics ours.)

In the case at bar the question as to whether it was the duty of the line-haul carriers to unload live stock consigned to petitioners at the Union Stock Yards in Chicago, was dependent upon the determination of the following questions purely of fact:

(1) The history of the unloading charge; (2) The established custom and usage at the Union Stock Yards,

with reference thereto; (3) the relationship between the line-haul carriers and the Stock Yards Company; (4) whether or not compensation to the line-haul carriers on account of the performance of the unloading service was included in the through line-haul rate to the Union Stock Yards in Chicago plus the $2.00 terminal charge; (5) whether on account of the congested conditions at the Union Stock Yards in Chicago, and on account of the confusion which would ensue if the shipper attempted to unload his live stock at the Union Stock Yards, it was the duty of the line-haul carriers to perform this service; (6) The question of fact as to shipper being barred or prohibited by rules of Stock Yards from unloading his own stock at that terminal; (7) whether the so-called unloading charge in fact covered other services for the exclusive benefit of the line-haul carriers, such as the guaranteeing and collection by the Stock Yard Company of the entire freight bills of the line-haul carriers; the making and keeping of a record of dead and injured animals on the basis of which the line-haul carriers settled their claims for lost or injured live stock; the removal from the live stock cars by the Stock Yard Company of dead animals left therein; the service of notifying the consignees of the arrival of live stock, and the furnishing to the line-haul carriers of terminal facilities for the receipt and delivery of live stock; (8) whether the unloading service was performed by the Stock Yard Company as agent for the line-haul carriers as a part of the transportation service which the line-haul carriers held themselves out in their published tariffs to perform.

After the decision of the Commission in 52 I. C. C. 209, a rehearing was granted; thereafter a great mass of testimony was introduced before the Commission bearing on the question of whether it was the duty of the

shipper or of the carriers to unload live stock at the Union Stock Yards in Chicago. We particularly refer to the hearings of May 20th, May 21st and May 22nd, 1919, shown in Original Ex. 7, referred to on page 269 of the Record. Please see resumé of facts adduced at said hearings, *supra*, pp. 4-5-6.

The finding of the Commission on this question is definite, precise and to the point. That finding is (R. 144):

> "The facts in this case are not in dispute. For more than 50 years carriers delivering live stock at the stockyards in Chicago have loaded and unloaded live stock, and made no charge therefor against the shipper. More than 4,000 cars of live stock are frequently delivered at the stockyards in Chicago on a single day. It is manifest that if the consignees or shippers undertook to unload their inbound shipments, or to load outbound shipments, there would result such confusion and congestion at the stockyards as seriously to interfere with orderly and prompt performance of the service. Counsel for the line-haul carriers conceded at the hearing that the shipper cannot go to the stockyards and physically load or unload his live stock; but their contention is that he should do it financially. Under the regulations of the stockyard company no shipper is permitted to perform the service, even if he should demand the right to do so. The line-haul rates to Chicago, plus a charge of $2.00 for terminal or switching service, have for years constituted the through charge and included delivery of live stock to the consignee at the stockyards. For the reasons stated we are of opinion that our finding that it is the duty of the shipper to load and unload live stock in the stockyards at Chicago was error, and it is therefore reversed. And we now find that it was the duty of the carriers to unload and load live stock at that point."

The Circuit Court of Appeals should have respected and accepted this finding of the Commission. No contention is made that the Commission, as to this finding,

acted arbitrarily or without evidence to support its conclusion, or that it transcended its constitutional or statutory powers. Under such circumstances the determination of that question was not subject to review by the Circuit Court of Appeals. (*Standard Oil Co.* v. *United States*, 283 U. S. 235; *Interstate Commerce Commission* v. *Delaware, L. & W. R. R. Co.*, 220 U. S. 235; *United States* v. *Louisville & N. R. R. Co.*, 235 U. S. 314; *Procter & Gamble* v. *United States*, 225 U. S. 282, at pages 296 to 298).

IF THE QUESTION OF THE DUTY TO UNLOAD LIVE STOCK WAS PURELY A QUESTION OF LAW, THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS WAS ERRONEOUS.

In *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, it was specifically held that the duty of unloading live stock consigned to a large terminal market is a duty of the line-haul carrier, inseparably connected with and constituting an integral part of the transportation of live stock; that although that duty may be delegated to an agency or instrumentality, the duty of unloading live stock nevertheless continues primarily to be the duty of the line-haul carrier who undertakes the transportation of live stock to a certain designated station to which the live stock is to be transported.

The contention made by the Stock Yard Company in *United States* v. *Union Stock Yards*, 226 U. S. 286, was that the Stock Yard Company was not subject to the provisions of said Act, because the service which it performed in connection with the transportation of live stock was a service independent of the interstate transportation of live stock and performed wholly within the State of Illinois. This court, however, regardless of the

fact that the "Act to Regulate Commerce" had been in force and effect for many years, adhered to the rule announced in the *Covington Stock Yards* case, 139 U. S. 128; it is clear that the basic reason for holding the Union Stock Yard Company to be a common carrier was that the unloading of live stock is a necessary incident to the interstate shipment of live stock, inseparably connected therewith. If this court in *United States* v. *Union Stock Yard Co.*, 226 U. S. 286, had held, in accordance with the contention of respondents in this case, that the unloading of live stock at the Union Stock Yards was an independent transportation service performed by an independent connecting carrier, then, obviously, it would necessarily have had to hold that the Stock Yard Company was not subject to the provisions of that Act, inasmuch as the service which it performed was rendered entirely in the State of Illinois as a separate and distinct service from the interstate transportation of live stock.

That this court, in *United States* v. *Union Stock Yards*, 226 U. S. 286, considered that the rule laid down in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, to the effect that it was the duty of a carrier of live stock to unload as a part of its engagement to transport live stock, continued to be the law after the enactment of the Act to Regulate Commerce, is clearly shown by the following language (p. 304):

> "That the service is performed wholly in one State can make no difference if it is a part of interstate carriage. 'The transportation of live stock,' said this court in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 136, in treating of the duties of common carriers, irrespective of the Act to Regulate Commerce, 'begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignees.'"

That it is the understanding of the courts generally that the rule laid down by this court in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, still applies to a line-haul carrier of live stock regardless of the enactment of the Act to Regulate Commerce, is indicated in *Burton* v. *Wabash Railway Co.*, (Circuit Court of Appeals, Missouri) 22 S. W. Rep. (2d Ser.) 201. There the court says on page 204:

> "It is not required to own and operate such yards itself, but may delegate that duty to another, but neither it or any one to whom it may delegate the duty may make an extra charge for merely receiving or delivering the stock in and through such yards."

Citing *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128; U. S. C. A. Title 49, Sec. 15, Par. 5.

In *Panhandle & S. F. Ry. Co.* v. *Phillips*, (Court of Civil Appeals, Texas) 197 S. W. Rep. 1031, it appears that the stock pens at Kansas City are owned and operated by the Kansas City Stock Yards Company, an independent corporation, and that the stock upon arrival at Kansas City is handled in a method similar to the handling of live stock at the Union Stock Yards in Chicago. There the court, in referring to the duty of the line-haul carrier to unload live stock at said yards, says:

> "This duty is a part of the 'transportation,' and is therefore non-delegable, and if the carrier employs independent agents to perform it, the liability remains the same. Section 1, Interstate Commerce Act (Section 8563 (2), West Publishing Company's Compiled Statutes of United States, Vol. 8, p. 9061); *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73; *Missouri Pacific Railway Co.* v. *Haynes*, 72 Tex. 175, 10 S. W. 398; Hutchinson on Carriers, par. 510."

In *Panhandle & S. F. Ry. Co.* v. *Crawford*, (Court of Civil Appeals, Texas) 198 S. W. 1079, the court, in re-

ferring to the unloading service by the Kansas City Stock Yards Company, an independent corporation, on page 1081 says:

> "The duty of the railway company to make delivery of the shipment at Kansas City, and in order to do this furnish the facilities necessary for the unloading and delivery of the cattle, is a part of the 'transportation' of an interstate shipment under Section 1 (2) of the Interstate Commerce Act, • • •.
>
> "This duty is non-delegable, and, if other agents are employed by the carrier to perform it, the liability would remain the same. Section 1, Interstate Commerce Act; Section 8563 (2), West Publishing Company's Compiled Statutes of the U. S., Vol. 8, p. 9061; *Covington Stock Yards Co.* v. *Keith,* 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73; *Missouri Pacific Ry. Co.* v. *Haynes,* 72 Tex. 175, 10 S. W. 398."

THE "ACT TO REGULATE COMMERCE" DID NOT ABROGATE THE PERFORMANCE BY THE CARRIER OF ANY DUTY WHICH AT COMMON LAW IT OWED THE SHIPPER OR THE PUBLIC.

We contend that the Act admits of no construction relieving the carrier from any duty or obligation connected with the transportation of live stock to the Union Stock Yards, Chicago. The "Act to Regulate Commerce" was enacted for the benefit and in behalf of the shippers and in furtherance of their rights. It was not intended to impair or destroy any duty which at the common law it was the duty of the carrier to perform. There is nothing in the provisions of the Act to Regulate Commerce, directly or indirectly, changing or modifying the common law as laid down in the *Covington Stock Yards* case. The line-haul carrier may, if it chooses, provide its own facilities for unloading live stock itself, or it may, if it chooses, select an independent corporate en-

tity, such as the Stock Yard Company, to perform the unloading service as its agent or instrumentality. *In either case it must in its own published tariffs provide, either in its line-haul rates or in a separate terminal charge, for the complete transportation of live stock, including the unloading service.* If after such tariff is filed changes occur which increase or decrease the cost to the carrier of such terminal service, the line-haul carrier must, if it desires to increase the cost of the transportation transaction to the shipper, show such change in its own tariffs. (Par. 3, Sec. 6, Act to Regulate Commerce.) If it does not do so it will be presumed to have waived the right to pass the increase on to the shipper. (*Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98.)

The opinion of the Circuit Court of Appeals assumes that because the Stock Yard Company is, under the Act, a common carrier, that any service which it performs with reference to the transportation of live stock is in legal contemplation performed by the Stock Yard Company for the shipper, and that the shipper is therefore obliged to look to the separate published tariffs of each and all of the common carriers who render any part of the service connected with the transportation of his property in order to ascertain what the cost of the entire transportation service shall be. The fact that the Stock Yard Company is an independent corporate entity and subject to the provisions of the Act to Regulate Commerce does not mean that the terminal service performed by it is independent of the complete transportation service which the line-haul carriers in their published tariffs hold themselves out to perform. *It is the nature and character of the service which is the important consideration.* (*United States* v. *Union Stock Yard*,

226 U. S. 286, at p. 304.) *It is important to keep in mind that while the Stock Yard Company was a separate independent corporate entity from that of the line-haul carriers, the service which it performed in the unloading of live stock was not separate and independent of the transportation service of the line-haul carriers, but was inseparably connected therewith.* (See *United States* v. *Union Stock Yard*, 226 U. S. 286.) It merely confuses the issue to say that the Stock Yard Company was an independent corporate entity, itself subject to the provisions of the Act to Regulate Commerce, because whether or not the agency or instrumentality which performs the terminal service is or is not a common carrier, and is or is not subject to the provisions of the Interstate Commerce Act, the nature and character of the service which it performs is essentially the same. If, as seems to be conceded, the Stock Yard Company, before the enactment of the Act to Regulate Commerce, in performing the unloading service, acted as the agent for the line-haul carriers, it is obvious that in performing the identical service after the enactment of the Act to Regulate Commerce its relationship as agent to the line-haul carriers in the performance of that service did not cease.

That a line-haul carrier may, since the enactment of the Act to Regulate Commerce, lawfully employ agents to perform for it and in its behalf a terminal service connected with the through transportation of property under through rates and charges provided by the initial carrier, is shown by the decision of this court in the Arbuckle case (*United States* v. *Baltimore & Ohio Ry. Co.*, 231 U. S. 274) and in *Warehouse Co.* v. *United States*, 283 U. S. 501.

This court, in the latter case, on page 506, says:

> "We may assume that railroads, in order to carry on their business as interstate carriers, are not bound to maintain their own freight stations, but may contract with others to supply them and to perform there the transportation services which they are under a duty to perform."

EVEN IF IT HAD NOT BEEN THE POSITIVE AND ABSOLUTE COMMON LAW OR STATUTORY DUTY OF THE LINE-HAUL CARRIERS TO UNLOAD LIVE STOCK CONSIGNED TO THE UNION STOCK YARDS, CHICAGO, WHEN THE LINE-HAUL CARRIERS IN THEIR PUBLISHED TARIFFS HELD THEMSELVES OUT TO PERFORM THE COMPLETE TRANSPORTATION SERVICE, INCLUDING THE UNLOADING OF LIVE STOCK AND PROVIDED DEFINITE THROUGH LINE-HAUL RATES AND A DEFINITE TERMINAL CHARGE COVERING COMPENSATION TO THEMSELVES FOR THE UNLOADING SERVICE, SUCH DUTY AND ALL OF ITS RESPONSIBILITIES BECAME THAT OF THE LINE-HAUL CARRIERS.

Regardless of whether or not, as a general proposition of law, it was the duty of a line-haul carrier, either before or after the enactment of the Act to Regulate Commerce, to unload live stock at a primary market such as the Union Stock Yards in Chicago, it is obvious that where a line-haul carrier actually assumes that obligation and in its published tariffs provides a definite through line-haul rate plus a definite $2.00 terminal charge covering compensation to itself for that service, its duty as to that service thereupon becomes absolute and it must provide full and complete instrumentalities for the performance of that service, as well as complete rates and charges covering that service. It is equally obvious that where such line-haul carrier once commits itself to the duty of performing such unloading service,

it cannot abandon the performance of that duty or throw any part of that duty on the shipper without first changing its published tariffs so as to plainly indicate to the shipper the part of such duty or service, or compensation therefor, which the carrier has abandoned.

That the line-haul carriers in their published tariffs established a fixed commodity or line-haul rate for live stock consigned to the Union Stock Yards is clearly shown by the testimony of H. W. Beyers, Assistant Freight Traffic Manager, Chicago & North Western Railroad, (Original Ex. 7, pp. 1249-1252; Certified Excerpts from Original Exhibits, pp. 171-172), where he testified that under the published tariffs of the line-haul carriers the shipper was advised that in the shipment of his live stock to the Chicago market the sole and only charges for such shipments would be "the flat Chicago rate plus $2.00 per car terminal charge that the carrier has indicated will pay the charges of the Union Stock Yard & Transit Company for loading and unloading." The fact that the flat Chicago rate plus $2.00 per car terminal charge was made by the published tariffs of the line-haul carriers the only charge against the shipper for the complete transportation of his live stock to the Union Stock Yards, Chicago, including the unloading thereof, was not controverted before the Interstate Commerce Commission, in the District Court, or in the Circuit Court of Appeals.

The finding of the Commission on this subject is precise, definite and conclusive. The Commission found (R. 144):

> *"The line-haul rates to Chicago plus a charge of $2.00 for terminal or switching service have for years constituted the through charge and included delivery of live stock to the consignee at the stock yards."*

It must be remembered that the line-haul rates to the Union Stock Yards in Chicago and the $2.00 per car terminal charge are, except as said line-haul rates were horizontally raised, as hereinafter set forth, the same line-haul rates and terminal charge involved in the case of *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy Railroad Co.*, 186 U. S. 320, and later in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98. In the former case, referring to the line-haul rates and terminal charge on shipments of live stock consigned to the Union Stock Yards in Chicago, it is said, page 336:

> *"There is also no room for question that during the many years these rate sheets were in force the carriers, under their contracts to carry to Chicago, delivered carloads of cattle to the stock yards without making any charge other than that which was specified in the through rate."*

In the opinion in *Interstate Commerce Commission* v. *Chicago, Burlington and Quincy Railroad Company*, 186 U. S. 320, attention is specifically directed (p. 327) to the fact that said $2.00 terminal charge included the trackage charge and cost of unloading. The same $2.00 terminal charge was again before this court in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, in which case in the opinion (p. 108) it also appears that the charge of the line-haul carriers for unloading live stock at the Yards was included in the $2.00 terminal charge. The $2.00 terminal charge involved in *Interstate Commerce Commission* v. *Chicago Burlington & Quincy R. R. Co.*, 186 U. S. 320, and in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, is the identical $2.00 terminal charge referred to by the Commission in this case in its order (R. 144).

Mr. H. W. Beyers, a traffic expert called in behalf of

the line-haul carriers at the hearing before the Commission in this case, testified as follows:

"A. I understand the $2.00 terminal charge to include the 25 cents for unloading."

(Certified Excerpts from Original Exhibits, p. 46; Original Ex. 6, pp. 511-512.)

The same traffic expert further testified in behalf of respondents at the hearing before the Commission:

"Q. Was the absorption of 25 cents unloading charge considered in fixing the price of $2.00 to be plussed on the Chicago rate? A. I so understood it, yes.

Q. When the original charge of $2.00 was made it included the unloading charge? A. The 25 cents; that is my understanding. * * * And if your (meaning Stock Yard Company) tariff had called for 50 cents at that time I take it the terminal charge would have been $2.25. It was a matter of tariff construction." (Explanation in parenthesis supplied.)

(Original Ex. 7, p. 1271.)

Again referring to the service of unloading, the same expert testified:

"Q. Would it not be true then that the service has been charged in the general rate to Chicago irrespective of this $2.00 charge which was put in to cover this proposed extra expense of trackage?

A. That is the situation."

(Original Ex. 7, p. 1284.)

Mr. Beyers further testified in referring to the reason why the line-haul carriers always paid the Stock Yard Company for the unloading of live stock at the Union Stock Yards (Certified Excerpts from Original Exhibits, pp. 50-51):

"Mr. Cowan: Q. Why did you pay for it if it was not your business to do it?

Mr. Beyers: A. Well, it is the terminal charge, Judge."

It has never been held by this court, or any other court, except the Circuit Court of Appeals in the instant case, that where a line-haul carrier in its published tariffs undertakes the complete transportation of property from the point of origin of the shipment to the point of destination, and for such complete service provides definite through rates and charges, there can be exacted from the shipper, either by the line-haul carrier or anyone else, an additional charge over and above the through charge specified in the published tariffs of the line-haul carrier merely because some other carrier down the line between the point of origin of the shipment and the point of destination has filed new published tariffs increasing to the line-haul carrier its charges for an incidental service which it performs for the line-haul carrier to enable it to carry out its contract for complete transportation with the shipper.

Paragraph 3 of Section 1 of the "Act to regulate Commerce" provides:

> "The term 'transportation', as used in this chapter, shall include locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage, *irrespective of ownership, or of any contract, express or implied, for the use thereof, and all services* in connection with the receipt, delivery * * * and handling of property transported." (Italics ours.)

Paragraph 7 of Section 6 of the Act provides:

> "No carrier * * * shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any services in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time;" * * *.

Paragraph 3 of Section 6 of the Act provides:

> "No change shall be made in the rates, fares and

charges, or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares or charges will go into effect."

It is obvious from a reading of the above provisions of the Act that where a line-haul carrier in its published tariffs undertakes to transport property between different points on its own route or between points on its own route and points on the route of some other carrier, and publishes a through charge for the performance of that complete service, any change which affects or disrupts the right of the shipper must be shown by a corresponding change in the published tariffs of the line-haul carrier holding itself out to perform the entire transportation service for a through rate or charge. It is equally obvious that such change or disruption of the right of the shipper cannot be made on the basis of the published tariffs of some other carrier. If a shipper was compelled to take notice of increases made in the charges of various agencies performing terminal services and the like for a line-haul carrier who undertakes the complete transportation of the property for a through rate or charge, then the object and purpose of the Act would not be attained and much uncertainty and confusion would exist. *If the tariff schedules of the common carrier performing some terminal or accessorial service for a line-haul carrier automatically affected the through transportation charge in the published tariffs of the line-haul carrier so that the shipper would be bound to pay the amount of an increase in the charges of the carrier performing such terminal or accessorial service for the line-haul carrier in*

addition to the through rate or charge contained in the published tariffs of the line-haul carrier, then logically a decrease in the charges in the published tariffs of such terminal or accessorial carrier would automatically reduce the amount which the shipper was required to pay under the through rate or charge set up in the published tariffs of the line-haul carriers. Such a condition would produce confusion and uncertainty and a situation which could not be tolerated.

For this reason alone the Commission was fully justified in condemning as unlawful the practice in question.

The matter of the form, contents and method of handling rates and rate schedules has been entrusted by the Act to Regulate Commerce to the Interstate Commerce Commission. That clearly is an administrative matter.

It is not consistent with the object, purpose, spirit and intent of the Act to Regulate Commerce that where the initial common carrier undertakes the complete transportation of live stock for a through rate or charge specified in its published tariffs, the rights of the shipper growing out of said through rate may be reduced or prejudiced by conditions imposed by another common carrier performing some part of the entire transportation service undertaken by the initial carrier. While probably not directly in point, the case of *Missouri, K. & T. Ry. Co.* v. *Ward*, 244 U. S. 383, shows the general intent of the Act to Regulate Commerce, as amended, not to allow another carrier to interfere with the contract rights of the shipper growing out of his contract with the initial carrier. The court in that case, on page 386, says:

> "The purpose of the Carmack amendment has been frequently considered by this court. It was to create in the initial carrier unity of responsibility for the transportation to destination. * * * The

bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not altered by the second issued by the connecting carrier. As appellants were already bound to transport cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void."

IV.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE SO-CALLED CLASSIFICATIONS IN THE PUBLISHED TARIFFS OF THE LINE-HAUL CARRIERS AND THE SO-CALLED ABSORPTION CLAUSE IN SAID PUBLISHED TARIFFS CONSTITUTED THE EXTENT OF THE OBLIGATION OF THE LINE-HAUL CARRIERS WITH REFERENCE TO SAID UNLOADING CHARGE. FURTHERMORE, THAT COURT IMPROPERLY CONSTRUED THE MEANING, FORCE AND EFFECT OF THE SO-CALLED ABSORPTION CLAUSE.

Here, again, the determination of the question as to whether or not the so-called absorption clause in the published tariffs of the line-haul carriers constituted the limit and extent of the obligation of the line-haul carriers with reference to said unloading service was inseparably bound up with the determination of questions of fact enumerated in the preceding sections of this argument.

Contrary to the contention of counsel for respondents, the published tariffs of the line-haul carriers and of the StockYard Company were not simple. The tariffs filed by the line-haul carriers and the Stock Yard Company in this case were voluminous and complicated and of such a nature as to call for expert knowledge as to their meaning, force and effect, in addition to an investigation as to the various facts relative to the history of said unloading charge, the actual relationship between the line-haul car-

riers and the Stock Yard Company with reference to the performance of that service, the established custom and usage of the line-haul carriers, the Stock Yard Company and the shippers with reference to the unloading services and manner of handling the charges therefor, together with the important other facts and circumstances referred to in the preceding subdivision of this argument.

What was said by this court in *Standard Oil Co.* v. *United States,* 283 U. S. 235, at page 236, and in *Standard Oil Co.* v. *United States,* 41 Fed. Rep. (2d) 836, at page 841, is particularly appropriate here. In the latter case it is said:

> "While questions of tariff interpretation may in some instances involve purely a question of law, in many instances such interpretation involves preliminary determination of facts which must be made before a court can assume jurisdiction, and in such instances resort must first be had to the Commission. * * * Whether the Commission, the shippers, and the respondent carriers had, by uninterrupted usage and custom, adopted a construction and application of the intermediate rule utterly inconsistent with respondent carriers' present contention, was a question of fact to be determined by the Commission, and in that determination it was exercising an administrative function and not one purely judicial."

This court, in affirming the District Court, says in *Standard Oil Co.* v. *United States,* 283 U. S. 235, at page 236:

> "The case before the Commission did not, as contended, involve merely a construction of the written words employed in a rate tariff—a simple question of law; but it required consideration of matters of fact and application of expert knowledge for the ascertainment of the technical meaning of words and a correct appreciation of a variety of incidents effecting their use."

But if the Circuit Court of Appeals had the right in

this case to substitute its judgment for that of the Commission on this question, that court was clearly wrong in coming to its conclusion on this phase of the case. We may concede, for the purpose of this argument, that the provisions of Official Classification No. 44 and of Western Classification No. 54, providing, "the consignor and consignee are responsible for the loading and unloading of the same, the carrier assuming no liability whatever in regard to the loading and unloading," did apply to outlying intermediate stations and to stations not specifically enumerated in the published tariffs. These classifications, however, never applied to shipments of live stock consigned to the Union Stock Yards in Chicago, because as to that particular station the published tariffs specifically provided a definite through base rate or commodity charge, plus a $2.00 per car terminal charge, and included the unloading service. (See specific finding of the Commission on this subject, R. 144; also testimony of respondent's witness Beyers, Certified Excerpts from Original Exhibits, p. 117; see also Certified Excerpts from Original Exhibits, pp. 167-169.)

In *Galveston, etc. Ry. Co.* v. *Lykes Bros.*, 294 Fed. Rep. 968, the court on page 971, says:

> *"it is a matter too well settled by the rules of the Commission, affirmed by the courts, that where a commodity rate is made in the tariff such commodity rate is the lawful rate and the only rate that can be used; the class rates are by it superseded."* (Italics ours.)

It seems absurd to contend that where, as in this case, the line-haul carriers in their published tariffs had established a definite flat Chicago rate, plus a $2.00 per car terminal charge, for the transportation of live stock consigned to the Union Stock Yards in Chicago, and in said line-haul or commodity charge plus the terminal charge admittedly included compensation to themselves for the

unloading service, the official classifications in the publisher tariffs, making it the absolute duty of the shipper and consignee to pay the entire expense of loading and unloading live stock, could have any application.

The conclusion reached by the Circuit Court of Appeals that the provisions of the official classification applied to shipments made to the Union Stock Yards, Chicago ignores the fact that the published tariffs of the line-haul carriers make complete provision for two separate and distinct classes of cases:

1. Where, as in the case of shipments to the Union Stock Yards at Chicago, the line-haul carriers held themselves out to the public to furnish complete transportation of live stock to the point of destination, including delivery, and in their published rates and charges included compensation for such unloading service;

2. In other cases where the line-haul carriers did not hold themselves out to the public as furnishing such complete transportation service, and where their published rates and charges did not include compensation for the unloading service.

It also ignores the finding of fact by the Commission that the line-haul rates to Union Stock Yards, Chicago, plus the $2.00 per car terminal charge, has for years constituted the through charge including unloading.

THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS THAT THE SO-CALLED ABSORPTION CLAUSE LIMITED ALL OBLIGATION OF THE LINE-HAUL CARRIERS TO THE PRECISE NUMBER OF CENTS MENTIONED THEREIN, WAS ERROR.

Here, again, the meaning of the language of the absorption clause is inseparably connected with the consideration of voluminous and complicated tariff sched-

ules and the necessary determination of facts with reference to the history of said unloading charge, the established custom and usage with reference thereto, and the nature and extent of the various services covered by the so-called loading and unloading charge. Therefore, on this question also the Circuit Court of Appeals should have accepted the finding of the Commission. (R. 144). (*Standard Oil Co.* v. *United States,* 283 U. S. 235; *Illinois Central R. R.* v. *Interstate Commerce Commission,* 206 U. S. 441, at 454; *Great Northern Ry.* v. *Merchants Elevator Co.,* 259 U. S. 285.)

(Note: The tariffs filed by the line-haul carriers and the Stock Yard Company in this case were voluminous and complicated and of such a nature as to call for expert knowledge as to their meaning, force and effect. Such tariffs are set forth in Original Exhibit 1, certified to this court, a few excerpts from the same being included in Certified Excerpts from Original Exhibits, pp. 165, 167, 169 and 172. The absorption clause referred to in the opinion of the Circuit Court of Appeals was not, as might be inferred from the opinion of the Circuit Court of Appeals, new but was contained in the published tariffs of the line-haul carriers ever since the Act to Regulate Commerce was enacted.)

PRESENCE OF ABSORPTION CLAUSE GAVE TARIFFS OF LINE-HAUL CARRIERS LEGAL EFFECT OF A JOINT RATE SO FAR AS RIGHTS OF SHIPPER WERE CONCERNED.

The rule is well established by the Commission that in every case in which the initial carrier in its published tariffs provides that it will assume or absorb terminal charges, switching charges of connecting lines, and the like, the effect thereof is to establish a joint rate. In

National Dock Co. v. *B. & M. R. R.*, 38 I. C. C. 643, at page 650, the Commission says: "So far as the shipping public is concerned, the effect of a switching absorption is to establish a joint rate." (See also *New York Lumber Co.* v. *St. L. M. & S.*, 21 I. C. C. 304.) The Commission has also held that the cancellation by the initial carrier of absorption charges which it has theretofore assumed disrupts a joint rate and the carrier must justify such cancellation by showing that the same is justified. (*Cincinnati Switching Absorption*, 44 I. C. C. 353, at page 354.)

It necessarily follows that even if the Circuit Court of Appeals was right in holding that the provisions of the so-called absorption clause limited the liability of the line-haul carrier to contribute to the expense of the unloading service, nevertheless, before any part of the expense of the unloading service could be lawfully imposed on the shipper, it would have been necessary for the line-haul carriers to have amended, in the manner required by paragraph 3 of Section 6 of the Act to Regulate Commerce.

ENUMERATION OF SPECIFIC NUMBER OF CENTS PER CAR IN THE ABSORPTION CLAUSE WAS NOT INTENDED TO LIMIT THE DUTY OF THE CARRIER WITH REFERENCE TO UNLOADING CHARGE.

Even if the Circuit Court of Appeals had been warranted in substituting its judgment on this question for that of the Commission, the Court was clearly wrong in its conclusion. The language of the so-called absorption clause (R. 253) must be construed in the light of the facts and circumstances existing at the time said absorption clause was included in the published tariffs of the line-haul carriers. The so-called absorption clause was

not new at the time it was inserted in the so-called Lowrey Tariff. Ever since the line-haul carriers published their rates and charges the same kind of an absorption clause was contained in their published tariffs. At the time the absorption clause was included in the original published tariffs of the line-haul carriers, and at the time they were merely continued in the Lowrey Tariff, the total amount of the loading charge of the Stock Yard Company to the line-haul carriers was 50 cents per car, and the entire amount of the unloading charge was 25 cents per car. The particular enumeration of the respective amounts of such loading and unloading charges in such absorption clause was merely descriptive of such charges and not inserted as a limitation of the amount of such charges which the line-haul carriers would pay. *The outstanding idea of the absorption clause was that the carriers would pay the Stock Yard Company for loading and unloading.* The mention of the particular number of cents per car was merely incidental or explanatory of the major premise of the absorption clause, viz: that the unloading service would be performed by the Stock Yard Company and paid for by the line-haul carriers without expense to the shipper other than as included in the flat Chicago rate plus the $2.00 per car terminal charge.

It is elementary that the meaning, force and effect of any written instrument is to be ascertained from the intent manifested and the facts and circumstances existing at the time of its execution. Its meaning, force and effect cannot be made to vacillate with each subsequent change in circumstances. If, when the published tariffs of the line-haul carriers were formulated and filed, it was the intent of such tariffs that the line-haul carriers would assume the entire expense connected with the un-

loading of live stock, the same tariffs,—after the Stock Yard Company had filed its new tariff showing an increase against the line-haul carriers for the unloading service, did not mean that the line-haul carriers would pay only a part of the expense connected with such unloading service. The absorption clause neither added nor detracted from the service specified in the published tariffs of the line-haul carriers, or from the rates and charges specified in said tariffs for that service. Without any absorption clause in said published tariffs, the obligation of the line-haul carriers would have been the same as with it.

PROVISIONS OF PUBLISHED TARIFFS MUST BE CONSTRUED MOST STRONGLY AGAINST THE CARRIER AND IN FAVOR OF THE SHIPPER.

The rule is well established that the tariffs prepared and filed by the carrier must be construed most strongly against the carrier and in favor of the shipper. (*Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, at page 105; *Southern Pacific Co.* v. *Lothrop*, 15 Fed. (2d) 486; *Sutherland Flour Mills Co.* v. *Director General*, 81 I. C. C. 365; *N. W. Steel Co.* v. *Director General*, 68 I. C. C. 195; *Pacific Rice Mills Co.* v. *Director General*, 78 I. C. C. 459.)

The case of *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, is directly in point. There the court, on page 105, says:

> "The carrier is under no obligations to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and commission that it is insisting upon it."

The carrier in preparing such tariff schedules selects its own language to express the intent of such tariffs,—the shipper has no voice in the matter. Furthermore, one of the objects and purposes of the enactment of the Act to Regulate Commerce was to guard and protect the rights and interests of the shipper as against the carrier. When we add to these considerations the undisputed facts with reference to the history of the unloading charge, the custom and usage of the line-haul carriers, the Stock Yard Company and the shippers, relative to the performance of that service and the payment therefor, the relationship between the Stock Yard Company and the line-haul carriers, and other facts which throw light on the subject, it is manifest that the so-called absorption clause cannot be construed as limiting the entire obligation of the line-haul carriers with reference to said unloading service to the particular number of cents set forth in said so-called absorption clause.

V.

THE STOCK YARD COMPANY, IN PERFORMING THE LOADING AND UNLOADING SERVICE, DID NOT OCCUPY A POSITION ANALOGOUS TO THAT OF AN INDEPENDENT CONNECTING CARRIER TRANSPORTING PROPERTY ON ITS OWN LINE FOR A PART OF THE DISTANCE COVERED BY THE SHIPMENT.

The crux of the contention of counsel for respondents, sustained by the Circuit Court of Appeals, is that in performing the loading and unloading service the Stock Yard Company acted as an independent common carrier, with its own tariffs, and was a connecting carrier to the line-haul carriers, just as another railroad with its separate tariffs in cases of shipments beginning on one road and ending on the other.

If the line-haul carriers in their published tariffs had restricted the transportation service to be performed by them and the charges to be made for such service to the mere carriage of the live stock on their rails, and the Stock Yard Company had held itself out to the public as performing the unloading service for and on behalf of the public for certain rates and charges specified in its tariffs for the performance of such service, then the position taken by respondents would, at least, have been logical; but where, as in this case, as found by the Commission, the line-haul carriers for more than 50 years delivered live stock at the Stock Yards in Chicago, loading and unloading the same, and making no charge therefor against the shipper, and in their published tariffs held themselves out to the public as performing the entire transportation transaction, including the unloading of such live stock at the Union Stock Yards, in consideration of a through charge consisting of their line-haul rates and a $2.00 per car terminal charge, how is it possible for respondents, with sincerity, to contend that the relationship of the Stock Yard Company and the line-haul carriers in the transportation transactions in question was just the same as the relationship existing between an independent originating common carrier and an independent connecting common carrier in cases of shipments beginning on one road and ending on the other?

To say that the Stock Yard Company in the transactions in question was an independent common carrier is to entirely lose sight of the facts with reference to the nature and character of the service performed by it and the capacity in which it rendered the same. The Stock Yard Company was an agency selected by the line-haul carriers to unload live stock. The history of the Stock

Yard Company shows that it was created and organized by the line-haul carriers for the express purposes of loading and unloading live stock consigned to and from the Chicago Stock Yards over the lines of the line-haul carriers (R. 123-124; see also *Interstate Commerce Commission* v. *Chicago, etc. R. R. Co.*, 186 U. S. 320.) The service performed by the Yard Company was a transportation service only in the sense that it was essentially and inherently a part of the transportation of live stock which the line-haul carriers in their published tariffs held themselves out to the public to perform. Separated from the transportation of live stock by the line-haul carriers, neither the Stock Yard Company nor the service it performed had cause for existence. It was a matter of no concern to the shipper whether the line-haul carrier did its own unloading or employed some other agency to perform that service.

NO PROPER PLACE HERE FOR TECHNICALLY JOINT RATES.

In this connection it is contended by respondents that the rates contained in the published tariffs of the line-haul carriers were not the joint rates of the line-haul carriers and of the Stock Yard Company. We admit that the published rates of the line-haul carriers were not technically joint rates of the line-haul carriers and of the Stock Yard Company in the sense that written concurrence in such rates was filed by the Stock Yard Company. The situation did not necessitate or require a joint rate being established by the line-haul carriers and the Stock Yard Company because the undertaking in the published tariffs of the line-haul carriers contemplated complete through transportation service of the live stock, including the unloading thereof, and contem-

plated that the line-haul carriers would furnish, for the through rates and charges therein specified, all facilities and instrumentalities necessary for the complete transportation service, including unloading. Where a given transportation service set forth in the published tariffs of a line-haul carrier contemplates that the service for which the shipper contracts shall be rendered in part over the lines of the originating carrier and in part over the lines of another common carrier, joint rates covering the combined services of the two carriers are usual and proper; but where, as in this case, the published tariffs of the line-haul carriers covered the complete through transportation of the live stock, including the unloading thereof, there was no occasion for a joint rate between the line-haul carriers and the Stock Yard Company. The Union Stock Yards was specifically named in the tariffs of the line-haul carriers as a terminal station to which the base rates or line-haul rates of the line-haul carriers and the $2.00 per car terminal charge applied. (Excerpts from Or. Ex. 167-171-172.) In addition the Commission in this case found that the loading platforms of the Stock Yard Company were, in effect, terminals of the line-haul carriers using the facilities of the Stock Yard Company (R. 134, 135, 139, 145). That finding of fact by the Commission was supported by ample evidence, and is not subject to review by the courts. The line-haul carriers also proceeded on the theory that the payment of the trackage charge to the Junction Company and the payment by it of the charges of the Stock Yard Company in effect made the facilities of the Junction Company and of the Stock Yard Company, to all intents and purposes, their own facilities, to be controlled by their own tariffs, in accordance with the definition of the

term "transportation" as used in Paragraph 3, Section 1 of the Act to Regulate Commerce, which provides:

> "The term 'transportation' as used in this section shall include * * * all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof."

CLEAR INTENT OF PUBLISHED TARIFF OF STOCK YARD COMPANY WAS TO RESTRICT THE APPLICATION OF ITS RATES AND CHARGES TO THE LINE-HAUL CARRIERS FOR WHOM IT PERFORMED THE UNLOADING SERVICE AS AGENT.

The clear intent of the tariff schedules filed by the Stock Yard Company on May 21, 1917, was that the charges therein contained for the unloading service were made solely against the line-haul carriers for a service performed by the Stock Yard Company as agent for the line-haul carriers and with the intention of not in any manner affecting the rights of the shipper.

The language of the Stock Yard Company's published tariffs of May 21, 1917, "the charge made by this company for the service (as a carrier's agent) of loading and unloading live stock at the Union Stock Yards at Chicago, Illinois," cannot be disregarded. The application of the rates and charges contained in said published tariffs must be confined to the limits expressly provided for in said tariffs. That it was the intent of the Stock Yard Company, in phrasing the same, to confine its force and effect to the line-haul carriers to the exclusion of the shipper, was frankly admitted by the Stock Yard Company at various hearings before the Commission. (R. 250-251; Original Ex. 6, pp. 316-341; Certified Excerpts from Original Exhibits, pp. 21-36.)

Manifestly, a tariff containing rates and charges to be paid by the line-haul carriers for whom the Stock Yard Company as agent performed the unloading service, could not justify the collection of all or any part of such charges from the shipper or consignee,—especially in view of the fact that the through line-haul rates and the $2.00 per car terminal charge in the published tariffs of the line-haul carriers already included every transportation service incident to the complete transportation and delivery of live stock into suitable pens at the Union Stock Yards, Chicago.

Although not of controlling importance, the record clearly shows that the controverted charges in question were collected by the Stock Yard Company as the collecting agent of the line-haul carriers.

The conclusion of the Circuit Court of Appeals that the Stock Yard Company in effect collected the 25 cents per car in question from the shipper, is directly refuted by the answer filed in the District Court in this case by the Stock Yard Company, where, in referring to the collection by the Stock Yard Company from the commission merchants at the Union Stock Yards, it is said (R. 22-23):

> "In every instance said service was performed by this defendant for and on behalf of the railroad from which said charge was collected, and that in no instance was said charge collected by this defendant from the shipper or consignee of any shipments * * *; that during the times referred to in the petition filed herein, it was acting as the agent of the railroad or line-haul carriers hauling said shipments into or out of said yards."

RESPONDENT, STOCK YARD COMPANY, ADMITS THAT IN PERFORMING UNLOADING SERVICE IT ACTED AS AGENT FOR THE LINE-HAUL CARRIERS; AND THAT ITS TARIFFS OF RATES AND CHARGES WERE INTENDED TO BE RESTRICTED TO LINE-HAUL CARRIERS.

The respondent Stock Yard Company does not in this court attempt to stultify itself by denying that it performed the loading and unloading service in question for and on behalf of the line-haul carriers and as their agent, or that it did not collect the charges in controversy from petitioners as their agent. In its brief, filed in opposition to the petition for a writ of certiorari herein, on page 15 it is said:

> "We do not concede that the Stock Yard Company was then or is now performing a common carrier service on its own behalf in loading and unloading live stock at the Stock Yards, but the Commission held it was."

The statement that the Commission held that the Stock Yard Company performed the loading and unloading service "on its own behalf" is a misinterpretation of the Commission's decision. While the Commission held that the Stock Yard Company, because of the nature and character of the service which it performed in connection with the interstate transportation of live stock by the line-haul carriers, was a common carrier subject to the provisions of the Act to Regulate Commerce, it did not hold that the Stock Yard Company was performing the service of loading and unloading live stock at the Stock Yards *on its own behalf*. On the contrary, the Commision, in its various findings and reports, clearly indicates that the Stock Yard Company, in performing the loading and unloading service at the Stock Yards, was not acting in its

own behalf as an independent common carrier, but that it was performing a terminal service inseparably connected with the duty undertaken by the line-haul carriers in transporting live stock to the Union Stock Yards under through rates and charges, including delivery.

Counsel for respondent Director General in their brief in opposition to the petition for a writ of certiorari, say that the answer and contention of the Stock Yard Company, that it performed the loading and unloading service for and on behalf of the line-haul carriers, and as their agent, was only made for the purpose of sustaining its contention that it was not a common carrier.

We assume that neither counsel for the Stock Yard Company, nor counsel for the Director General, mean that Stock Yard Company in so specifically stating in its answer and in so contending the facts to be, misrepresented the truth as to the relationship between itself and the line-haul carriers. Regardless of the particular contention which it was the intent of the portions of the answer of the Stock Yard Company above referred to to support, the fact remains that the Stock Yard Company, in its answer filed in the District Court, and in the position taken by it before the Commission, represented to the court and to the Commission, respectively, that in performing said loading and unloading service, and in collecting the charges therefor, it at all times was acting for and on behalf of the line-haul carriers, and as their agent.

RECORD CONCLUSIVELY SHOWS STOCK YARD COMPANY ACTED AS AGENT OF LINE-HAUL CARRIERS.

Nor is there the slightest question in this case that the Stock Yard Company, in formulating and filing its published tariffs, intended to make the services and the

rates and charges therein applicable solely to the line-haul carriers for whom for more than a half century they had performed the unloading service and by whom, during all of that time, they were paid. (R. 250-251; Original Exhibit 6, pp. 316-394; Certified Excerpts from Original Exhibits, pp. 21 to 36 and 54 to 58).

Mr. Henkle, the General Manager of the Stock Yard Company, testified: (Cert. Excerpts from Orig. Exhibits page 21)

> "Q. Does the Stock Yard Company act as the collecting agent for the delivering carriers in collecting the freight charge from the consignees on the live stock handled at the Union Stock Yards?
> "A. Yes, sir."

Mr. Henkle further testified: (Cert. Excerpts from Orig. Exhibits page 83)

> "Q. Well, you publish a tariff don't you in which you say you make a collection as agents of the carriers for all of this business?
> "A. Yes sir.
> "Q. Is that your understanding that this is a charge that is due you from the carriers for the service that you perform for the carriers?
> "A. The carriers for more than half a century paid us for it so we concluded we were doing it for them."

W. H. Beyers, Assistant Freight Traffic Manager Chicago & North Western Railroad, and one of the principal witnesses in the case, called as a witness for the respondents line-haul carriers, testified, when being examined by Mr. Shaw, counsel for the Stock Yard Company, (Cert. Excerpts from Orig. Exhibits pages 46 and 47):

> "Q. I mean that while at Chicago you have performed the service of loading and unloading since 1865. At these small places in the country where there may be a small chute or private switch track you have never done it?
> "A. No sir.

"Q. You have always done it here?

"A. No sir, you did (meaning the Stock Yard Company) and we paid you for it." (Explanation in parenthesis ours.)

That it was the intent of the Stock Yard Company in filing its new tariff schedules of May 21, 1917 increasing its loading and unloading charges to make the same apply exclusively to the line-haul carriers so as not to impose any part of said charge on the shippers, is clearly shown by the representations of Mr. Shaw, the attorney for the Union Stock Yard and Transit Company, at various hearings before the Commission. Mr. Shaw there stated with reference to said schedules, (Cert. Excerpts from Orig. Exhibits pages 54 and 55):

"That tariff notified each person for whom we act as the carriers' agent that we will charge them for that service more than we had previously charged to the extent that the tariff increased the rates; there was notice to the carriers to that effect and they did not object to it. We have a right under that tariff to collect from the same people that have been paying us since 1865 the advance charge. That is my contention."

Mr. Shaw further stated, (Cert. Excerpts from Orig. Exhibits page 56):

"I say that the plain phraseology of the tariff shows that we propose to increase the charge for the service we rendered to those for whom we have always rendered it, to-wit: the carriers whose agents we are and not to any shipper in the United States."

(See also Cert. Excpts. from Orig. Ex. pp. 57-58.)

Mr. Shaw further stated at one of the hearings before said Commission, (Orig. Exhibit No. 6, page 577)

"Mr. Burgess: (attorney for one of the line-haul carriers) I want to know for my own information, do you now contend Mr. Shaw, that the tariff which you filed does not create a lawful charge against the shipper as filed with the Commission?

"Mr. Shaw: The tariff which was filed in my judgment, if it is a tariff at all, increased the charge to the people that have always paid us for the service and not the shipper."

IT IS WHOLLY IMMATERIAL IN THIS CASE WHETHER THE STOCK YARD COMPANY WAS AUTHORIZED BY THE LINE-HAUL CARRIERS TO PUBLISH ITS TARIFFS IN SUCH FORM AS TO CLEARLY INDICATE THAT THE SAME WERE FILED BY IT AS THE AGENT OF THE LINE-HAUL CARRIERS AND SO AS TO MAKE THE RATES AND CHARGES THEREIN CONTAINED APPLY SOLELY TO THE LINE-HAUL CARRIERS.

It is contended by respondent Director General of Railroads that the Stock Yard Company had no authority from the line-haul carriers to file its published tariffs in the form in which they were published. Counsel for respondent Stock Yard Company do not join in this contention. It is insisted that agency cannot be shown by the mere declarations of the agent, and that the statements contained in the published tariffs of the Stock Yard Company that said tariffs were filed by it as the agent for the line-haul carriers amounted to nothing, because it was the mere declaration of the Stock Yard Company that it was, in the performance of the services set forth in its published tariffs, acting as the agent for the line-haul carriers. Regardless of the fact that the record before the Interstate Commerce Commission clearly shows that the Stock Yard Company for more than 50 years, and at all times since its creation, acted as agent for the line-haul carriers in performing for them a terminal service inseparably connected with their duty to transport live stock, nevertheless it is wholly immaterial in this case whether the Stock Yard Company, in so publishing its tariffs, was or was not authorized by the line-

haul carriers so to do. Even if we were to assume, which we do not, that a carrier performing a terminal service in connection with the through and complete transportation of live stock undertaken by a line-haul carrier, may not lawfully, under the provisions of the Interstate Commerce Act, file its tariffs of rates and charges in such a manner as to make the same applicable only to the line-haul carrier for whom it performs the terminal service, nevertheless, since the Stockyard Company actually did publish their tariffs in that manner, such tariffs did not constitute lawful authority to exact said charge from petitioners.

WHILE THE PUBLISHED RATES OF THE STOCK YARD COMPANY WERE ITS LEGALLY ESTABLISHED RATES, AND IN THAT SENSE LEGAL, THEY WERE NOT LAWFUL RATES AS AGAINST THE CONSIGNEES FROM WHOM THEY WERE EXACTED.

It is apparent also that the Circuit Court of Appeals, in justifying the exactment from the shipper of the additional 25 cents per car through the method or practice adopted by the line-haul carriers and the Stock Yard Company, on the ground that the Stock Yard Company, being a common carrier, was compelled by law to collect the full amount provided in their published tariffs for the performance of such service, overlooked this important fact, namely, that in the published tariffs of the Stock Yard Company it was specifically stated, "the charge made by this company for the service (as a carrier's agent) of loading and unloading live stock at the Union Stock Yards, Chicago, Illinois, is as follows" etc. The statement made in the published tariffs of the Stock Yard Company, that the charge of that company for the service of loading and unloading live

stock at the Union Stock Yards in Chicago was for a service performed by it as the carrier's agent, cannot be disregarded. Whether the Stock Yard Company could properly file its tariffs of rates and charges to confine the force, effect and operation of such charges to the line-haul carriers for whom it performed the loading and unloading service, is not controlling on the question involved. The question is—having so filed their published tariffs as to make the same applicable to the line-haul carriers, could the Stock Yard Company lawfully collect said charges from the shipper or consignee?

The Circuit Court of Appeals in its opinion proceeds on the theory that under the law the Stock Yard Company was compelled to collect its published rates and charges, and that in collecting its published rates and charges it was doing only what the law compelled it to do. The opinion, however, loses sight of the distinction between the legal rate and the lawful rate.

As this court says in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 52 Sup. Ct. Rep. 183, on page 184:

> "Although the act thus created a legal rate, it did not abrogate, but expressly affirmed, the common law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate • • •. Under Section 6 the shipper was bound to pay the legal rate; but, if he could show that it was unreasonable, he might recover reparation."

The right to reparation is the same where the exaction of the charge is unlawful on the ground that it is exacted with tariff authority, as where the charge exacted is unlawfud on the ground that it is unreasonable too high. While a carrier is, under penalty of law, compelled to collect the charges set forth in its published

tariffs, it does not follow that in order to do so, it may lawfully collect such charges from one against whom such charges were by said tariffs made inapplicable. Therefore, while the rates in the Stock Yard Company tariff were legal rates the exaction of the same from petitioner was unlawful.

In the opinion of the Circuit Court of Appeals, in justifying the collection of the extra 25 cents per car, it is said (R. 396):

> "The line-haul carriers definitely refused to absorb it," and (R. 397) "No one was taken by surprise or deceived."

We submit that the verbal refusal of the line-haul carriers to pay the extra 25 cents per car, and the fact, if it be a fact, that no one was taken by surprise or deceived, is wholly beyond the question. The law is well established that the published tariffs on file constitute the sole and exclusive source of the shipper's information. The line-haul carriers could not lawfully deviate from their published tariffs by any verbal refusal or representation. If the line-haul carriers desired to inform the shippers and the public of any change in their former usage and practice with reference to the payment of the entire expenses of loading and unloading, the only manner in which they could lawfully indicate that intention was through their published tariffs.

THE QUESTION OF WHETHER THE EXTRA 25 CENTS PER CAR, WHEN ADDED TO THE AMOUNT WHICH THE LINE-HAUL CARRIERS IN THEIR LINE-HAUL RATES PLUS $2.00 PER CAR TERMINAL CHARGE, WAS UNREASONABLE FROM THE STANDPOINT THAT IT WAS EXCESSIVE, WAS NOT INVOLVED IN THIS CASE. WHEN THE COMMISSION FOUND THAT THE PRACTICE RESORTED TO IN EXACTING THE EXTRA CHARGE WAS UNLAWFUL IT WAS UNNECESSARY TO DETERMINE WHETHER THE CHARGE COLLECTED WAS EXCESSIVE.

Much has been said by respondents with reference to the fact that the Commission made no finding that the amount of any charge collected by either respondent was unreasonable. The Commission made no finding one way or the other on this subject. That question was not there involved. If the line-haul carriers in this case, before resorting to the unlawful practice condemned by the Commission, had amended their tariffs on file to make them conform to the increased charges promulgated by the Stock Yard Company in its tariffs, and plaintiffs had complained to the Commission that the new tariff rates of the line-haul carriers were unreasonable and excessive, then there would have been involved before the Commission not only the question as to whether the increased charges for loading and unloading were unreasonable and excessive, but whether the entire transportation charges, including loading and unloading, as set forth in the line-haul carriers' new tariffs, were unreasonable and excessive. But such was not the situation here.

Any rate or charge exacted from the shipper, which is not contained in the published tariffs of the line-haul carriers, is *ipso facto* and conclusively unlawful. Having found that the additional charge in con-

troversy was unlawful because it subjected the shipper to a charge for the same service in the published tariffs of two independent carriers and therefore in effect was a double charge for the same service, and having held that the practice resorted to by respondents to exact the unlawful charge from petitioners was unlawful, it was wholly unnecessary to also ascertain whether the charge so held to be unlawful was also unreasonable from the standpoint of its being excessive.

VI.

THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS THAT THE INCREASED CHARGE OF 25 CENTS PER CAR WAS JUSTIFIED BY REASON OF THE EXTRAORDINARY CONDITIONS PERTAINING TO THE INCREASED COST OF LABOR AND OTHER EXPENSES INCIDENTAL TO THE UNLOADING OF LIVE STOCK, WAS THE DETERMINATION OF A QUESTION OF FACT WHICH IT WAS NOT THE PREROGATIVE OF THAT COURT TO DETERMINE.

The rule is well established that courts are without power to make rates or to determine what is or what is not a reasonable rate or a justification for an increase in a rate. Such matters are vested exclusively in the Interstate Commerce Commission, and the determination of the Commission on such questions is conclusive and not subject to review by the courts, unless the Commission has acted arbitrarily or without evidence to support its conclusions or has transcended its constitutional or statutory powers. (*Standard Oil Co.* v. *U. S.*, 283 U. S. 235; *Interstate Commerce Commission* v. *Delaware L. & W. Ry. Co.*, 220 U. S. 235; *U. S.* v. *Louisville & N. R. R. Co.*, 235 U. S. 314; *Procter & Gamble* v. *U. S.*, 225 U. S. 282, at pps. 296-298.)

But if the court had power to determine that the extra

25 cents per car was justified by existing conditions relative to the increased cost of labor and cost of service generally, that question could not be determined without also inquiring as to whether the flat increases made to the line-haul carriers in their line-haul rates, based on the identical conditions referred to, were not sufficient to take care of the extra 25 cents per car. The record shows that the line-haul rates of the carriers, including the rates on live stock, which in part, as we have heretofore pointed out (*supra* page 28) included the unloading charge, were, on account of the very conditions mentioned by the Circuit Court of Appeals, increased three successive times, the first increase being 5%, the second increase being 15% and the third increase being 25% of the then existing rates. (See Ex. 7, pages 861, 890, 891.) It is extremely probable that the flat increases in the line-haul rates were sufficient, or more than sufficient, to reimburse the line-haul carriers for the payment of the additional 25 cents per car for the unloading service to its agent the Stock Yard Company.

VII.

A—THE RIGHT OF PETITIONERS TO MAINTAIN THIS SUIT MAY BE SUSTAINED UNDER THE PRINCIPLES OF LAW LAID DOWN IN THE DARNELL-TAENZER CASE, 245 U. S. 531.

May we again refer briefly to the legal character of this action and to the facts and circumstances out of which it arose. The action is not *ex contractu*, but an action in tort (*Southern Pacific Co* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, at page 534), and grows out of "the wrong done by respondents in exacting the unlawful rate of charge." (*Louisville & N. R. Co.* v. *Sloss-*

Sheffield Co., 269 U. S. 217.) In the latter case this Honorable Court, on page 234, says:

> "The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carriers. Every carrier who participates in the infliction of this wrong is liable in solido *like every other joint tort feasor.*" (Italics ours.)

Respondents, in exacting the unlawful charges involved in this case, were joint tort feasors, who cannot under the law, question the right or title of the person from whom they exacted the unlawful charges or raise any question concerning the rights and equities of others in the money exacted. (*Darnell-Taenzer* case, 245 U. S. 531; *Sloss-Sheffield* case, 269 U. S. 217.)

The testimony introduced at the various hearings before the Interstate Commerce Commission established, without contradiction, that petitioners were specifically named as consignees in the bills of lading covering the shipments involved in this case. Upon the arrival of the cars at the Union Stock Yards, petitioners, as such consignees, either paid or directly assumed all transportation charges, including the unloading charge in question, by bank checks drawn on their individual bank accounts (Cert. Excpts. Or. Ex. 156). Afterwards they in their own name and right as factors sold the live stock consigned to them and after deducting all freight and other expenses, including the unlawful charge in question, either remitted the proceeds to the consignor or credited the amount on the consignor's account. According to the established custom which prevailed in the Union Stock Yards, petitioners, as consignees of the shipments involved, were personally and primarily liable to the line-haul carriers who, for all transportation charges, looked directly to them and not to the consignors

for payment. In accordance with that custom, if overcharges of freight were paid the commission men made claim therefor upon the carrier in their own names. On the other hand, in accordance with that custom, if the carrier at any time found that there was an undercharge in the payment of freight on any shipment, it made claim directly to the commission men as consignees named in the contract of carriage (R. 151; Testimony of D. C. Mosier, Chairman of the Transportation Committee of the Chicago Live Stock Exchange, and of H. R. Park, Traffic Manager of the Chicago Live Stock Exchange; Original Ex. 8, pp. 25 to 96 and 96 to 126, referred to on page 269 of the Transcript of Record herein and certified to this court as an original exhibit).

On this subject the Commission specifically found (R. 151):

> "We find that the following individuals, copartnerships, and corporations, parties of record, made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to reparation."

This finding, under the authority of this court in *Mills* v. *Lehigh Valley R. R.*, 238 U. S. 473, is a sufficient finding of the ultimate facts to entitle plaintiffs herein to recover and that said finding is *prima facie* of the right to plaintiffs to seek recovery in their individual right as consignees from whom the unlawful charges were exacted.

Where a District Court undertook to substitute its views for a finding of the Commission with respect to relationship between the parties before it, this court, in reversing the District Court, stated as follows:

"The findings of the Commission, that the broker

> acts only as agent and that from the time that the pulp is put aboard the steamer there is a continuing intent that it should be transported to Garfield, *ought to have been accepted by the District Court as conclusive, since there was ample evidence to sustain it. Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268; *Virginia Ry Co.* v. *United States,* 272 U. S. 658." (Italics ours.) *United States et al v. Erie Railroad Co. et al.,* Appellants. Decided November 25, 1929. 280 U. S. 103.

What was said by the Interstate Commerce Commission in *Doughty-McDonald Grocery Co.,* 155 I. C. C. 47, on page 49, is particularly appropriate here. There the claim for reparations was made by a consignee. His right to reparation was questioned because it appeared that he was not the real party in interest and the one who ultimately bore the charge in question. The Commission, however, says:

> "When a carrier delivers freight to a consignee and the consignee accepts delivery and pays transportation charges thereby extinguishing the carrier's lien, a contract on the part of the consignee to pay undercharges, if any exist, is implied. Consequently, the carrier may recover in a suit for such undercharges against the consignee. *Union Pac. R. Co.* v. *American Smelting & Refining Co.,* 202 Fed. 720, 121 C. C. A. 182. For the same reasons that a consignee can be compelled to pay an undercharge, he should have the reciprocal right to recover any amount that he has been compelled to pay in excess of a just and reasonable charge."

This view of the Interstate Commerce Commission is sustained by *Union Pacific R. Co.* v. *American Smelting & Refining Co.,* 202 Fed. 720. It is also sustained by this court in a case particularly in point (*New York Central & Hudson River Ry. Co.* v. *York & Whitney,* 256 U. S. 406), where it was held that a commission man named as consignee in certain shipments made to him is directly liable to the carrier for undercharges which by mistake

were not in the first instance collected by the carrier from the commission man, and this the court held was true, as a matter of law, irrespective of any contract contained in the bill of lading. Such liability under the provisions of the Act to Regulate Commerce extends for a period of three years. (Interstate Commerce Act, Sec. 16, Paragraph 3.)

From what has been said it is obvious that petitioners in presenting and seeking to enforce reparation on account of the unlawful loading and unloading charge in question, were not mere intruders having no legal interest in the subject matter in controversy, as Judge Woodward in his opinion holds them to be (R. 77). It is difficult to understand how anyone can say that persons *named as parties to the transportation contract*, and who actually paid the unlawful charges in question to respondents, and who became personally liable to the line-haul carriers for all freight charges the instant they accepted delivery of the live stock, and who were repeatedly recognized by the carriers as the proper persons with whom to settle loss and damage claims on account of shipments of live stock consigned to them, can be said to be purely volunteers having no legal interest in a suit brought to recover the part of said freight charges so paid by them which was unlawful and exacted from them by an unlawful practice. The only parties to a tortious transaction are parties whose act or acts were instrumental in exacting the unlawful charge and the party from whom it was exacted. It makes no difference whose money it was which was exacted.

The principle which lies at the foundation of the right to reparation in a case of this kind is exactly the same as in a case where a wrong-doer wrongfully takes a sum of money in the possession of a servant, who has no ac-

tual or legal interest in the money, and where the loss ultimately must fall on the master. Obviously, in such case it would be no answer to a suit brought by the servant against the wrong-doer for him to show that the servant was not the one who was ultimately injured by the loss of the money taken. This principle is enunciated and applied by this court in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531. There this court, speaking through Mr. Justice Holmes, on page 534 says:

> "*The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum.* • • • The cases like *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations. *But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss.*" (Italics ours.)

What was said by this court in *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217, is particularly enlightening on this question. It shows conclusively that the element of pecuniary loss to the plaintiff is not controlling in a case involving the recovery of unlawful or excessive freight charges unlawfully exacted. There this court, on pages 234 and 235, says:

> "It is claimed that the Sloss-Sheffield Company cannot recover because it was not damaged by the excessive freight charges. • • • The objection urged is not that the company failed to make specific proof of pecuniary loss—the failure held in *Pennsylvania R. R. Co.* v. *International Coal Mining Company*, 230 U. S. 184, 206, to be fatal in a suit under Section 2 for unjust discrimination, and in *Davis* v. *Portland*

Seed Co., 264 U. S. 403, to be fatal in a suit under Section 4 for violation of the long- and short-haul clause. *The carrier concedes, as it must under Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, *that a recovery for excessive freight charges can be had under Section 1 without specific proof of pecuniary loss, and that the measure of damages is the amount of the excess exacted.*" (Italics ours.)

On page 240 the court says:

"*The wrong for which the statute renders the carrier liable is the exacting of payment pursuant to an unlawful rate,* not the withholding of the excess unlawfully exacted."

In the *Sloss-Sheffield* case, on page 238, the court says:

"With the rights or equities as between seller and purchaser it (referring to the carrier) had and has no concern, nor need we concern ourselves with them."

Here petitioners, by accepting the live stock consigned to them by the shippers in the shipments covered by this case, thereupon, under the decision of the Federal Court in *Union Pacific R. Co.* v. *American Smelting & Refining Co.*, 202 Fed. 720, and under the decision of the Supreme Court of the United States in *New York Central & Hudson River Ry. Co.* v. *York & Whitney*, 256 U. S. 406, became *ipso facto* personally liable for the payment of the freight charges regardless of the terms and provisions of any contract contained in the bill of lading. Petitioners being thus personally liable, paid the freight rate, including the unlawful charges, out of their own funds. The fact that petitioners in the due course of business, after the shipment of live stock was sold as an independent transaction, charged the freight, including the unlawful charge, to the owner or consignor of the live stock, does not mean that the unlawful charges were paid by petitioners out of the shippers' funds. The identity

of the money received from the sale of cattle by petitioners was not preserved. The unlawful charges in question were paid by checks drawn by petitioners against their own funds. (Certified Excerpts from Original Exhibits, p. 156.) The money exacted therefore was the money of petitioners.

The fact that the commission men, in remitting to their principals the proceeds of the sale of live stock, deducted the extra amount over and above the lawful charges which should have been paid, merely gave the principals a separate right of action against the commission men for the amount of the deduction. Respondents, who became joint tort feasors the moment the unlawful charges were exacted from the commission men, could acquire no legal right in a subsequent transaction in which they were not parties and had no legal interest. As one joint tort feasor cannot claim contribution from another joint tort feasor, so, in principle, respondents can assert no rights arising out of a subsequent separate transaction which gave rise to an independent cause of action against the commission men and in favor of their principals to recover the amount deducted by the commision men over and above the lawful charges which should have been deducted.

Granting that the owners or consignors of the live stock, under the particular facts and circumstances in this case, could have directly and individually maintained the proceedings for reparation before the Interstate Commerce Commission and have prosecuted suit for damages based on said order of reparation in the District Court, it does not follow that petitioners from whom the unlawful charges in question were exacted did not also have such legal right, especially where, as in this case, petitioners acted under express authorization from

the owners or consignors. The rule is well established that an action for damages growing out of the shipment of property may be maintained either by the consignor or consignee, or by the owner of the property transported.

In *Edgerton* v. *C. R. I. & P. R. Co.*, 240 Ill. 311, the question arose as to whether the carrier, when sued by the consignor of a shipment of eggs, could call into question the title of the consignee to the same and whether the consignee, though shown to be not the owner of the property, could maintain an action for damages to recover the value of such shipment. The court in that case sustained the right of the consignee to bring the action, and in doing so quoted from *Great Western Railway Co.* v. *McComas*, 33 Ill. 186, as follows:

> "No principle is better settled than that the consignor for breach of the duty, be he but a bailee, may sue. He has such a special interest in the property as gives him the right of action, *so may the real owner sue and so may the consignee.*" (Italics ours.)

On page 317 of the opinion the court further says:

> "Even assuming that they were shipped to bailee to be sold on commission (bailee being the consignee) he had such an interest, under *Great Western Railway Co., supra,* and the authorities heretofore cited, that he could rightly recover in an action of tort against the appellant."

In *Finn* v. *Western Railroad Co.*, 112 Mass. 524, it was held that the consignor of goods delivered to a carrier for shipment may maintain an action and recover the full value of the property although it be admitted that such consignor is not the owner of the property and has no property interest therein, and where it is admitted that the entire ownership and interest in the property is in the consignee, the court holding that in such case a

recovery by the consignor constitutes the consignor trustee of an express trust for the use and benefit of the actual owner.

The same rule is announced in *Hooper* v. *The Chicago & Northwestern Ry. Co.*, 27 Wis. 81, where the court, on pages 90 and 91 of the opinion, says:

> "The fourth and last position taken is, that the plaintiff was not the owner of the flour at the time of the loss, and cannot sue, but that the title was in the consignees, who alone can maintain an action. In *Blanchard* v. *Page*, 8 Gray, 281, it was held, after a most elaborate examination, that the shipper named in a bill of lading may sue the carrier for an injury to the goods, although he has no property, general or special, therein. * * * The shipper is a party in interest to the contract; and it does not lie with the carrier who made the contract with him, to say, upon a breach of it, that he is not entitled to recover the damages, unless it be shown that the consignee objects; for, without that, *it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor or shipper is, by operation of the rule, regarded as a trustee of an express trust, like a factor or other mercantile agent who contracts in his name on behalf of his principal.*"

In *Southern Express Co.* v. *Kraft*, 49 Miss. 480, the rule as laid down by the Supreme Court of Wisconsin in *Hooper* v. *The Chicago & Northwestern Ry. Co.*, 27 Wis. 81, is adopted and quoted with approval.

The rule is thus laid down in 10 Corpus Juris, 349:

> "If the consignor has no interest in the goods and his right of action is based solely on privity of contract, an action by him for failure to carry and to deliver safely to the consignee will inure to the benefit of the consignee or real owner; *in such case the consignor is considered trustee of an express trust.*"

NOTE: It is important to keep in mind that this court in the *Sloss-Sheffield* case did not state or intimate that if the suit for reparation in that case had been brought by the consignee who in the first instance paid the unlawful charges, such consignee could not have maintained an action to recover the same. If the consignee in the *Sloss-Sheffield* case had brought the suit for reparation and the consignor had acquiesced in the claim being made by the consignee, then undoubtedly the Supreme Court in the *Sloss-Sheffield* case would have held, under the rule applied in the *Darnell-Taenzer Lumber Company* case, 245 U. S. 531, that the consignee would have the right to maintain said suit, and if the carrier had objected to the consignee maintaining such suit, it would have been met with the rule as laid down in the *Darnell-Taenzer* case, and would have been met by the identical language used by this court in the *Sloss-Sheffield* case, on page 238:

> "The carrier did not know of the provision in the sales contracts. With the rights or equities as between seller and purchaser it had and has no concern, nor need we concern ourselves with them."

It is significant that in the *Sloss-Sheffield* case this court, on page 237 of the opinion, refers to the fact that the consignees named in the shipments in that case had acquiesced in the prosecution of the claim for reparations by the consignor. There is nothing to indicate that the court in the *Sloss-Sheffield* case intended to recede in the slightest degree from the rule laid down in the *Darnell-Taenzer* case, to the effect that the carrier ought not to be allowed to retain his illegal profit and that the one who was in relation with him and from whom the carrier took the sum can recover.

Since the decision of Judge Woodward, the Interstate Commerce Commission, after having had called to their

attention the decision of Judge Woodward in this case, have continued to apply the rule as laid down in *Missouri Portland Cement Co.* v. *Director General,* 88 I. C. C. 492, and the long line of decisions based on that case and on the reasoning of the Supreme Court of the United States in the *Darnell-Taenzer* case. The latest case in the Court on the subject is *Consolidated Cut Stone Co.* v. *Atchison, T. & S. F. Ry. Co.,* 39 Fed. (2d) 661. In that case the carriers made exactly the same contention as the defendants are making here. The court, however, adopted the interpretation of the *Darnell-Taenzer* case, 245 U. S. 531, and the *Sloss-Sheffield case,* 269 U. S. 217, as we interpret those decisions.

The court then cites as its authority the language of this court in the *Darnell-Taenzer* case, 245 U. S. 531, at page 551:

> "The general tendency of the law in regard to damages at least is not to go beyond the first step. * * * The plaintiffs suffered losses to the amount of the verdict, which they paid. Their claim accrued at once on the theory of the law, and it does not inquire into later events."

B—PLAINTIFFS IN THIS CASE ARE SHOWN BY THE RECORD HEREIN TO HAVE OCCUPIED A SOMEWHAT BROADER RELATIONSHIP TO THEIR CUSTOMER SHIPPERS THAN THAT OF AN ORDINARY FACTOR, WHICH RELATIONSHIP UNDER THE PARTICULAR FACTS IN THIS CASE, DID NOT CEASE WHEN THEY REMITTED TO THEIR CUSTOMERS A PART ONLY OF THE PROCEEDS DERIVED FROM SAID SHIPMENTS, BUT CONTINUED THEREAFTER AND STILL CONTINUES; THAT BY VIRTUE OF THIS RELATIONSHIP, AND FROM DIRECT CONNECTION WITH THE TRANSPORTATION TRANSACTIONS IN QUESTION, PLAINTIFFS HAD THE LEGAL RIGHT IN THEIR OWN NAMES AND RIGHT TO MAINTAIN SAID PROCEEDINGS FOR REPARATION BEFORE THE INTERSTATE COMMERCE COMMISSION AND TO MAINTAIN THIS SUIT IN THE DISTRICT COURT.

Our position under this phase of the case is that the law has always recognized the right of the ordinary factor to bring suit in his own name and in his own right, either disclosing the name of his principal or not, as he may see fit, to recover the property consigned to him, or the proceeds, or any part thereof, and to recover for any injury to said property after the same may have come into possession, and that that right exists so long as the relationship of the parties continues and so long as there remains any duty for the factor to perform. This rule of the common law is laid down in 25 Corpus Juris, 406, as follows:

> "As against a wrongdoer, a factor may maintain an action in his own name for torts relating to the goods in his possession, and may recover damages to the full amount of the injuries to the goods."

Judge Woodward in his opinion admits the rule of the common law to be as we have stated. In his opinion (R. 76) he says:

> "That a factor has authority to bring suit in his own name for damage or injury to goods in his business as a factor, or to recover the purchase price

where he has an interest in the way of commissions or advancements, and in other circumstances where he is a trustee of an express trust, there can be no doubt."

Judge Woodward, in coming to the conclusion that plaintiffs as factors had no right to sue in their own names, does so on the theory that the relationship between the shippers and the plaintiffs, and all duties of the plaintiffs growing out of said relationship, absolutely ceased when the plaintiffs remitted the net proceeds derived from the sale of live stock to their respective customers. A moment's reflection, however, will demonstrate that the relation, duties and obligations of the commission men, plaintiffs in this case, were not at an end when they remitted *only a part of the money to which the shippers were lawfully entitled.* The shippers were entitled to the full amount of the proceeds of the sale of their cattle, less only lawful charges and deductions.

Here the commission men remitted only a part of the proceeds to which the shipper was lawfully entitled. As to the part which they did not remit,—the part covered by the unlawful unloading charge exacted,—the commission men were still legally liable to the shipper and under a duty to collect and remit the amount of the same to the same extent as they were at the beginning to remit the entire proceeds of the sale, less lawful deductions. Especially is this true under the uncontradicted facts in this case.

Here the record shows that when said commission merchants and members of said Chicago Live Stock Exchange in the first instance paid said unlawful unloading charges to the carriers, and afterwards charged the same back against the individual shippers, or deducted

from the proceeds due said individuals from said shippers the amount of the same, they represented and gave assurance to said shippers that they would present to said Interstate Commerce Commission a claim for reparation for the use and benefit of said shippers (R. 340; Testimony of D. C. Mosier taken before the Interstate Commerce Commission and shown on pages 25 to 96 of Defendants' Original Exhibit 8, referred to on page 269 of the Record; Testimony of H. R. Park, taken before said Interstate Commerce Commission and shown on pages 96 to 126 of Defendants' Original Exhibit 8; Testimony of approximately fifty commission merchants, plaintiffs in this case, who testified before the Interstate Commerce Commission at its session of October 3, 1922, as shown by Defendants' Original Exhibit 9, referred to on page 270 of the Record.)

It is admitted that a factor is ipso facto the trustee of an express trust. Is it possible to conceive, from a legal standpoint, of the relation of trustee and *cestui que trust* being ended while the trustee still has duties to perform?

In *Hamilton* v. *Dillin*, Federal Case No. 5979, reported in Federal Cases, Volumes 11 and 12, at page 332, this contention of Judge Woodward was squarely refuted. There the court, on page 333, says:

> "For the plaintiffs it was contended that they were entitled to maintain the action as factors *even if their factorship had terminated before the commencement of this suit.*" (Italics ours.)

On page 334 of the opinion the court, in disposing of this question, says:

> *"If as factors in charge of the cotton the plaintiffs were required to pay and did pay for permits to ship the same to the loyal states, and the exaction of the money so paid was illegal, I think that they*

became entitled to recover the aggregate of the money thus paid, unless there is some reason to the contrary which would preclude a recovery by the owners themselves." (Italics ours.)

In *Smith & Son* v. *Bloom,* 159 Iowa, 592, suit was brought by a commission firm at the Union Stock Yards at South Omaha, Nebraska, to recover the purchase price of certain sheep consigned to them by a shipper. Suit was brought by the plaintiffs as commission men in their own names, *and after they had remitted all of the proceeds of sale to the owner and shipper. It was contended by the defendant that plaintiffs could not maintain the suit in their own names because they were not the real parties in interest and because the relation of principal and factor had ceased when the plaintiffs remitted the proceeds of the sale to the owner and shipper.* The court, however, on page 597 of the opinion, says:

"Counsel for appellee contends that plaintiff cannot maintain this action for the reason that it was acting for another, *and is not the real party in interest.* * * * It may be that as between plaintiff and its principal there would be a duty on plaintiff's part to account to the principal for any recovery herein, if that has not already been done. *Plaintiff is a factor, and as such, unless there is some objection on the part of its principal, or unless the principal intervenes, may sue in its own name and recover damages for a breach of the contract, or to recover the purchase price.*" (Italics ours.)

On page 598 the court says:

"*But it is said for appellee that plaintiff has paid to his principal the full amount of the purchase price.* * * *. That was a matter between plaintiff and its principal, and no affair of the defendant.*" (Italics ours.)

In *Progress Blue Ribbon Farms* v. *Chicago Horse Sales Co.,* 153 Wis. 249, the court says:

"*As indicated, a factor, the same as an auction-*

eer, is entitled to sue for the sale price in his own name and control the litigation if the principal does not prohibit it.'' (Italics ours.)

In *Beardsley* v. *Schmidt,* 120 Wis. 405, Judge Marshall, on page 411, says:

"Possession of the property, with authority to sell it in the capacity of commission merchants, made them factors, with the implied authority incident thereto, and also made them trustees of an express trust with the right to bring this suit, * * *. As soon as appellants assumed in regard to the property the status of commission merchants, they acquired a special interest therein which was increased by the continuance of their possession and their services in making the sale, giving them the right, within all the authorities, to bring this action and to control the litigation, *since there is nothing to indicate that such control is contrary to the wishes of the owners of the property.''* (Italics ours.)

The finding of the Commission as to the relationship existing between petitioners and the owners or consignors of the live stock involved in the shipments in question, clearly sustains the right of petitioners in this case to maintain this suit. The Commission says (R. 151):

"There is a direct and well established relation between the complaining members of the Exchange and other shippers, by which the former are fully authorized to present these claims and seek awards of reparation in their own names as factors and agents for such shippers. The commission merchant at the stock yards not only disposes of the shipper's stock at the market and at such price as he deems best, but is his agent in the payment of freight and related charges, such as feeding, etc., and in the filing of claims for overcharge and for the loss and damage to stock in transit. Defendants have frequently recognized this relationship by settling loss and damage claims with the commission merchants."

The Circuit Court of Appeals, under the rule repeatedly laid down by this court, should have accepted the finding of the Commission with reference to the relationship between the consignors or owners of the live stock in question and petitioners. (*Western Chemical Co.* v. *United States,* 271 U. S. 268; *Virginian Ry.* v. *United States,* 272 U. S. 658; *United States* v. *Erie R. R. Co.,* 280 U. S. 103; *Mills* v. *Lehigh Valley R. R. Co.,* 238 U. S. 473.) But even if the technical relation of principal and agent ended when the commission men remitted only a part of the proceeds to which the shippers were lawfully entitled, then clearly the acts of the commission men, plaintiffs in this case, by reason of the representations that they would obtain reparations for the shippers for the unlawful charges deducted, coupled with the course pursued by said plaintiffs before the Interstate Commerce Commission in obtaining reparation, *clearly constituted said plaintiffs trustees of an express trust and as such they were entitled to maintain the original petition in the District Court.* If they were trustees of an express trust, it was not necessary, under the law, that in said petition they disclose the names of the beneficiaries in whose behalf they were acting, although that fact clearly appears when the original petition and the exhibits accompanying it and made a part hereof are read as a whole.

If it was so necessary the District Court, to prevent a failure of justice on a mere technicality, should have permitted the amendment to the petition prayed for by petitioners. (R. 318 to 333.)

The right of commission men and factors in reparation cases has been frequently recognized by the Commission.

Memphis Freight Bureau v. *St. Louis & San Francisco Ry. Co. and Director General,* 57 I. C. C. 212; *Detroit*

Coal Exchange v. *Director General as Agent*, 80 I. C. C. 258; *Texas Live Stock Shippers' Protective League* v. *Director General*, 139 I. C. C. 448.

The cases above referred to are only a few of scores of orders of the Commission of like character. This court and the Federal courts have repeatedly enforced orders for reparations entered by the Interstate Commerce Commission in cases where the proceedings before the Commission were at the instance and on the complaint of persons, organizations and societies acting in their representative capacity for the use and benefit of the real party or parties in interest.

The decision of this court in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, is in principle, and because of the reasoning therein contained, conclusive on the question of the right of one person having no pecuniary interest in the reparation sought to maintain a suit in his own name for the use and benefit of other persons who were the real parties in interest and who actually sustained a pecuniary loss and injury.

That case was instituted before the Interstate Commerce Commission by the Cattle Raisers' Association of Texas, a voluntary unincorporated society, and the Commission, on complaint of that Association, ordered reparation. Claims for reparation were made by one Spiller, Secretary of the Cattle Raisers' Association, under certain alleged assignments purporting to have been made by the shippers of cattle involved in the transactions out of which the claims for reparation arose. Spiller recovered a judgment in the District Court of the United States for the Western Division of Missouri for the amount of the award of reparation as made by the Commission. The Circuit Court of Appeals, Eighth Circuit, in the case of *Atchison, T. & S. F*

Ry. Co. v. *Spiller,* 246 Fed. 1, reversed the judgment of the District Court in favor of Spiller on the ground that the record disclosed in Spiller no such interest as would enable him to maintain said suit. The case then came to this Court on certiorari and is reported in the case of *Spiller* v. *A. T. & S. F. Ry. Co.,* 253 U. S. 117.

It appears in the opinion in that case, page 123, that in that case the shipments of live stock were usually consigned to a commission firm; that the freight was paid in the first instance by the consignee to the delivering carrier and subsequently the cattle were sold upon the market and the amount of freight deducted from the purchase price, remittance being made of the balance, so that in all cases the owner and shipper of the cattle finally paid the transportation charges. This court sustaining the order of the Commission reversed the Circuit Court of Appeals for the Eighth Circuit, and, in referring to the right of Spiller to maintain the action, on page 124 says:

> "In some of the claims the shippers made assignments to H. E. Crowley, then being Secretary of the Cattle Raisers' Association, in a form set forth in the report; that subsequently Crowley ceased to be such Secretary and was succeeded by Spiller, the plaintiff, to whom Crowley assigned all claims previously assigned to him; and that other specified claims were assigned by the shippers to Spiller after he became Secretary, the form of assignment being the same as that previously employed."

Coming to the grounds on which the Circuit Court of Appeals for the Eighth Circuit reversed the judgment of the District Court, this court, on pages 133 and 134 of the Spiller case, says:

> "That court" (referring to the Circuit Court of Appeals for the Eighth Circuit) "held that upon the undisputed evidence the legal title to the claims for reparation never vested in Spiller, and hence

that the Commission was wholly without authority to order reparation to be made to him."

The court then held that this fact would not prevent Spiller from prosecuting the suit, for, as the court says:

"There was evidence that the assignments were made for nominal considerations *because the Cattle Raisers' Association was prosecuting the claims for the benefit of the owners thereof.*" (Italics ours.)

The court, in referring to said assignments by the shippers to Spiller, says, on page 134:

"What they did not pass to him was the beneficial or equitable title. But this was not necessary to support the right of the assignee to claim an award of reparation and enable him to recover it by action at law brought in his own name but for the benefit of the equitable owners of the claims; especially since it appeared that such was the real purpose of the assignments. • • • Section 16 as amended provides that where an award of damages is made by the Commission and the carrier does not comply with the order the complainant, *or any person for whose benefit such order was made,* may bring suit." (Italics ours.)

When the opinion of the Supreme Court in the *Spiller* case is examined, it clearly appears that this Court in that case construed said alleged assignments to Spiller, *not as assignments in the ordinary sense of that term, but merely writings executed by the shippers to enable the Cattle Raisers' Association to prosecute the claims of the shippers for reparation,* and held that although Spiller was not the real party in interest, he was justified in bringing said suit in his representative capacity for the use and benefit of the shippers who were the real parties in interest. In other words, this Court construed said alleged assignments to be nothing more or less than powers of attorney. In the case at bar the record before the Interstate Commerce Commission shows (Certified Excerpts from Or. Ex. pp.

140-153) (Original Ex. 8, p. 102) by the testimony of H. R. Park, the Traffic Manager of the Chicago Live Stock Exchange, that the commission men, members of the Chicago Live Stock Exchange and plaintiffs in this case, *held powers of attorney from all of the shippers upon all of the shipments upon which plaintiffs filed claims.* Therefore, under the decision of this Court the United States in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, as well as under the spirit and intent of the provisions of the Act to Regulate Commerce, plaintiffs had the right not only to represent said shippers before the Commission, but to bring suit in the District Court to recover damages in accordance with the Commission's award.

Conclusion.

The record in this case shows exceptionally long and laborious proceedings before the Interstate Commerce Commission, including the taking of extraordinarily voluminous proofs, which it required many years to collect, marshal and present to the Commission. The tremendous task of furnishing to the Commission proof of possibly a million or more separate shipments from 174,600 shippers, and covering the unlawful charges exacted in this case, has meant years of research and labor and obviously the necessary expenditure of many thousands of dollars. The result of all these years of labor and effort, with the attendant expenditure of money, is in a moment swept away by the Judge of the District Court on the basis of a highly technical rule of procedure and practice, and by the decision of the Circuit Court of Appeals predicated largely on the ground that that court disagreed with the Interstate Commerce Commission

in its determination of the facts in the case and the meaning of the published tariffs of the line-haul carriers.

The Commission was fully informed as to all facts the determination of which were inextricably bound up with the ultimate question involved. The questions necessarily incidentally involved related to a great extent to matters of policy and the proper handling of live-stock in the principal live-stock market in the world, where the needs and necessities of the situation and the particular usages and customs there prevailing made the case dependent largely on the particular facts and circumstances at that market.

The Circuit Court of Appeals and the District Court should have accepted the findings and conclusions of the Commission.

We respectfully submit that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit and the judgment of the District Court be reversed and the cause remanded to the District Court with such directions as this court may deem appropriate.

Respectfully submitted,

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February 22, 1932.